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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 273

ENOCH L. JOHNSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print.
Record from D. C. U. S., District of New Jersey	"A"	1
Docket entries	"A"	1
Indictment	"G"	1
Bill of exceptions	1	1
Testimony of Maie Paxson	241	15
John M. Bewley	259	19
Maie Paxson (recalled)	277	24
Benjamin Ravinsky	678	31
Ralph Weloff	696-A	34
Benjamin Ravinsky (recalled)	822	59
Colloquy re testimony of Martin Michael	865	60
Testimony of Martin Michael	871	61
Benjamin Rubenstein	898	71
Heradon Daniels	929	74
Leroy B. Williams	973	74
William Sheppard	996	75
James F. Towhey	1005-A	77
Colloquy re motion to strike certain testimony	1113	93
Testimony of Enoch L. Johnson	1115-A	94
William B. MacDonald	1773	161
Closing address to jury in behalf of the Government	1875	167
Charge of the Court	2072	172

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1942.

Record from D. C. U. S., District of New Jersey—Continued	Original	Print
Motion for new trial	2108	199
Opinion denying motion for new trial	2108	200
Judgment	2112	202
Notice of appeal	2114	203
Additional ground of appeal	2118	205
Assignments of error	2120	205
Proceedings in U. S. C. C. A., Third Circuit	2122	214
Petition for order staying execution, etc., and order denying same	2122	214
Minute entry of hearing	2134	216
Opinion, Biggs, J	2135	217
Concurring opinion, Goodrich, J	2153	233
Dissenting opinion, Jones, J	2153	233
Judgment	2163	242
Clerk's certificate (omitted in printing)	2163	
Stipulation as to record	2164	242
Order allowing certiorari	2169	244

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

No. 390-c

UNITED STATES OF AMERICA,

vs.

ENOCH L. JOHNSON

DOCKET ENTRIES

1941

June 17 Indictment for income tax evasion for 1935, 36, 37, etc.

June 18 Ord. Bench warrant issue (Maris) Bench warrant issued.

June 18 Plea not guilty reserving right to withdraw plea for the purpose of making motion later against Ind.

June 18 Ord. bail fixed $5,000 Ord. clerk take bail. Recog (810 a) Dr & fid.

June 18 Ord. trial set for Monday, July 14, 1941 (Maris)

June 21 Bench warrant returned executed.

June 24 Hearing before Hon. Albert B. Maris, Judge on motion for bill of particulars.

June 24 Ord. recess to 1:30 P.M.

June 24 Ord. Motion granted to extent of the answers filed by government Denied as to others (Maris)

June 24 Ord. application for inspection of documents denied (Maris)

June 24 Demand for bill of particulars filed

June 24 Answer to demand for bill of particulars filed

July 2 Pet. & order that Jos. W. Burns and Wm. Frank show cause re issuing summons etc. filed (A)

July 2 Pet. & order that Paul F. Snyder show cause why summons issued for Rupert Chase should not be quashed filed (A)

July 2 Pet & order that Paul F. Snyder show cause why [fol. "B"] summons heretofore issued for Louis Kessel should not be quashed filed (A)

July 2 Pet. & order that Paul F. Snyder show cause why summons heretofore issued for Florence Osbeck should not be quashed filed (a)

DOCKET ENTRIES—Continued

1941

July 2. Order denying motion for bill of particulars and motion for inspection of records filed (Maris)

July 2. Hearing before Hon. Albert B. Maris, Judge, on petitions to quash summons issued to E. L. Johnson, Louis Kessel, Florence Osbeck and Rupert Chase

July 2 Order to discharge rules to show cause. Mr. Burns instructed to apply to Judge Maris for permission to issue further summons

July 12 Reqs. for witnesses (3) issg 5 subpoenas issg 24 copies

July 14 Trial moved before Honorable Albert B. Maris, Judge

July 14. Ord. that each prospective juror be sworn and examined on his or her voir dire before being seated in the jury box and that after the jury box be filed, that counsel then proceed to challenge and examine as each challenge is exercised.

July 14 Ordered recess to 2 P.M.

July 14 Ordered jury sworn July sworn

July 14 Ordered bailiffs sworn. Bailiffs, Wm. Kish, David Rizzotte, Margaret Weatherby and Josephine E. Henry Sworn

July 14. The court directed that the clerk make an entry that in the court's opinion the trial was likely to be a protracted one and ordered two alternate jurors be drawn & sworn

July 14 Alternate jurors drawn and sworn

July 14 By agreement of counsel—ord. juror #12 be excused and another be drawn and after being drawn the jury as then constituted was ordered sworn Jury sworn

July 14. The alternates were then ordered and were resworn.

[fol. "C"] July 14 Ord. that the jury and the alternates be taken into custody by the U. S. Marshal during the trial until a verdict is reached or until discharged by the court.

July 14. Ord. adjourned until July 15, 1941 at 10 A.M.

July 14 Pet & Order for writ of habeas corpus for Benj. Rubenstein filed (A)

July 14 Writ of habeas corpus issued. Orig & 2 cert. copies U. S. Marshal

July 14 Pet. & order for writ of habeas corpus for Martin Michael filed (a)

Docket Entries—Continued

1941

July 14 Writ of habeas corpus issued Writ and 2 cert copies U. S. Marshal

July 14 Req. for witnesses—issg. 2 subpoenas Issg 2 copies

July 15 Trial com. before Hon. Albert B. Maris, Judge

July 15 By agreement of counsel—order that Juror #4 be excused and that alternate #1 take seat #4 in jury box

July 15 It was agreed by the government and by the defendant that jury as now constituted may try the case

July 15 Ord. jury sworn Jury sworn

July 15 Ord. alternate Matilda Fowle sworn

July 15 Ord. Bailiff sworn (same 4)

July 15 The court renews its order that the jury be taken into custody until a verdict is reached or until discharged by the court

July 15 Swearing 2 witnesses

July 15 Ord. recess to 2:15 P.M.

July 15 Swearing 3 witnesses

July 15 Ord. adjourned to July 16, 1941 at 10 A.M.

July 15 subpoenas returned (3)

July 16 Trial continued before Hon. Albert B. Maris, Judge

July 16 Ord. recess to 2:15 P.M.

July 16 Ord. adjourned before Albert B. Maris, Judge

July 17 Swearing 4 witnesses

July 17 Ord. a recess to 2 P.M.

[fol. "D"] July 17 Swearing 6 witnesses

July 17 Ord. adjourned to July 18, 1941 A.M.

July 17 Req. for witnesses (2) Issg. 2 subpoenas issg. 3 copies

July 18 Trial con. before Hon. Albert B. Maris, Judge

July 18 Ord. recess to 2 P.M.

July 18 Swearing 6 witnesses

July 18 Ord. adjd. to July 19, 1941 at 10 A.M.

July 18 Subpoenas returned (2)

July 19 Trial con. before Hon. Albert B. Maris, Judge

July 19 Swearing 5 witnesses

July 19 Ord. recess to 2:15 P.M.

July 19 Swearing 3 witnesses

July 19 Ord. adjd. to July 21, 1941 at 10 A.M.

July 21 Trial con. before Hon. Albert B. Maris, Judge

Docket Entries—Continued

1941

July 21 Ord. mo. by Mr. Winne to strike certain testimony denied

July 21 Ord. mo. by Mr. Winne to dismiss Ct. 1 denied

July 21 Swearing 3 witnesses

July 21 Ord. recess to 2 P.M.

July 21 Swearing 4 witnesses

July 21 Ord. adjd. to July 22, 1941 at 10 A.M.

July 22 Trial con. before Hon. Albert B. Maris, Judge

July 22 Swearing 8 witnesses

July 22 Ordered recess to 2 P.M.

July 22 Swearing 1 witness

July 22 Ordered adjourned to July 23, 1941 at 10 A.M.

July 23 Trial continued before Hon. Albert B. Maris, Judge

July 23 Swearing 3 witnesses.

July 23 Ordered recess to 2 P.M.

July 23 Swearing 13 witnesses

July 23 Ordered adjourned to July 24, 1941 at 10 A.M.

July 23 Reqs for witnesses issg. 2 subpoenas Issg 3 copies

July 24 Trial con. before Hon. Albert B. Maris, Judge

July 24 Swearing 12 witnesses

July 24 Ord. recess to 2 P.M.

[fol. "E"] July 24 Ord. motion by Mr. Winne to strike certain testimony granted in part and denied in part

July 24 Ord. Motion by Mr. Winne for direction of verdict in favor of defendant on Ct. 1 denied

July 24 5 P M. ord. recess to 7:30 P.M.

July 24 at 9:40 P.M. ord. adjd. to July 25, 1941 at 10 A.M.

July 24 Req. for witnesses Issg. 1 subpoena Issg 1 copy

July 25 Trial con. before Hon. Albert B. Maris, Judge

July 25 Upon request of Juror #2 Anna Toy and upon consent of counsel order Juror #2 be excused and that the alternate Matilde Fowle take her seat #2.

July 25 Order same bailiffs resworn.

July 25 Verdict Ct. 1 not guilty; ct. 2 guilty; ct. 3 guilty

July 25. Upon request of counsel for defendant each member of the jury was polled as to ct. 2 & 3 and as each member's name was called each answered guilty

July 25 Ordered defendant to be committed in default of bail

July 25 Ordered clerk take bail recog. Dr. & fid.

July 28 subpoenas returned (3)

DOCKET ENTRIES—Continued

1941

July 28 Motion for new trial filed

July 29 Subpoenas returned (4).

July 31 Hearing before Hon. Albert B. Maris on motion for new trial

July 31 Ordered motion for new trial overruled

Aug. 1 Order denying motion filed (Maris (ord. ent'd 7/31/41)

Aug. 1 Sertence on Ct. 2 Fine $10,000 and 5 years U. S. Pen Custody A. G. etc.

Aug. 1 On Ct, 3 fine of $10,000 & 5 years U. S. Pen custody A. G. etc. said terms to run consecutively making 10 years in all said fines to be accumulative, together with costs of prosecution, and stand com. until fines are paid (Maris)

Aug. 1 Ordered that certified copy of this signed judgment serve as the commitment of the defendant (Maris

[fol. "F"] Aug. 1 Warrant of commitment issued Dup.

Aug. 1 Notice of appeal filed

Aug. 13 Duplicate com. returned executed

Aug. 18 Notice re preparation of record filed

Aug. 27 Additional ground of appeal filed

Aug. 27 Order extending time for filing assignments of error to September 20, 1941 filed (Maris

Aug. 27 Bill of exceptions filed (4 books)

[fol. g] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 390-c

UNITED STATES OF AMERICA

v.

ENOCH L. JOHNSON, Defendant

INDICTMENT

In the District Court for the District of New Jersey, ss:

The grand jurors for the United States of America duly impanelled and sworn in the District Court of the United

States for the District of New Jersey, at the April term of said Court in the year 1941, and inquiring for said District, upon their oaths and affirmations present and charge:

That Enoch L. Johnson, whose full and true name is to the grand jurors unknown, except as aforesaid, late of the City of Atlantic City, State of New Jersey, hereinafter sometimes called the defendant, during the calendar year 1935 and to and including March 15, 1936, was an individual who was the head of a household, and who had one dependent; that during all of said time the said defendant [fol. h] maintained his legal residence and principal place of business in the City of Atlantic City, State of New Jersey, within the First United States Internal Revenue Collection District of New Jersey; that during said time his regular accounting period was on the basis of the calendar year and not on the basis of a fiscal year; that for the said calendar year the said defendant had, derived and received a gross income of over $5,000, computed in accordance with the Revenue Act of 1934, c. 277, 48 Stat. 680 (and exclusive of items which, under the provisions of said Revenue Act, shall not be included in gross income and shall be exempt from taxation), to wit, $107,804.71, derived as follows, that is to say:

Salaries, Wages, Commissions:

Mays Landing Record	$7,500.00
American Oil Company	2,716.04
Johnson Est. Adm. Com.	750.00
Commissions	28,245.59
Numbers Game	46,400.00
P. R. S. L. Railroad Contract	28,000.00
Interest	303.00
Capital Loss	(2,000.00)
Taxable Interest Liberty Bonds	3.42
Dividends (a)	458.66
Dividends (b)	428.00
Total Income	$107,804.71

That for and during the said calendar year the said defendant was entitled to and allowed by the said Revenue Act deductions (other than those deductions taken in com-

puting gross income as aforesaid) in the sum of, to wit, $89,776.54, and no more, on account of the following:

[fol. i]

Interest paid on notes	$2,475.43
Taxes paid, auto licenses	90.50
Bad debts	39,710.61
Atlantic City Land Co. stock	32,500.00
Class and Nachod Brewing Co.	15,000.00
Total Deductions	$89,776.54

That accordingly the said defendant had, derived and received for said calendar year a net income (the gross income less the deductions allowed by law) of, to wit, $18,028.17, upon which said net income, after the allowance of all credits to which he was entitled under the provisions of said Revenue Act, he owed to the United States of America an income tax of, to wit, $1,232.18; that by reason of the foregoing facts the said defendant, after the close of the said calendar year and on or before the 15th day of March, 1936, was required to make under oath to the Collector of Internal Revenue for the Collection District aforesaid, at Camden, in the State of New Jersey, within the Judicial District of New Jersey, and within the jurisdiction of this Court, a return for the said calendar year, stating specifically the items of his gross income and the deductions and credits allowed by the said Revenue Act, and the said defendant was further required, on or before the 15th day of March, 1936, to pay at least one-fourth of the amount of tax so due and owing to the United States as aforesaid, to the said Collector of Internal Revenue;

That the said defendant, well knowing all of the foregoing facts, did on, to wit, March 9, 1936, in the State and Judicial District aforesaid, and within the jurisdiction of this Court, wilfully, knowingly, unlawfully and feloniously attempt to evade and defeat said tax of, to wit, $1,232.18, upon his said net income for the said calendar year 1935, [fol. j] and as means of so wilfully, knowingly, unlawfully and feloniously attempting to evade and defeat said tax, did on, to wit, March 7, 1936, in the State and Judicial District aforesaid, make under his oath an income tax return for said calendar year and thereafter, on March 9, 1936, did file and cause to be filed with said Collector of Internal

Revenue said income tax return for said calendar year, stating specifically therein the items of his gross income for said calendar year to have been the sum of $33,404.71, and no more, derived as follows:

Salaries, Wages, Commissions:

Mays Landing Record	$7,500.00
American Oil Company	2,716.04
Johnson Est. Adm. Com.	750.00
Commissions	23,245.59
Interest	303.00
Capital Loss	(2,000.00)
Taxable Interest Liberty Bonds	3.42
Dividends (a)	458.66
Dividends (b)	428.00
Total Income	$33,404.71

and stating specifically the items of deductions (other than those taken in computing the amount of gross income aforesaid) allowed to him by said Revenue Act for said calendar year to have been the sum of $89,776.54, on account of the following:

Interest paid on notes	$2,475.43
Taxes paid, auto licenses	90.50
Bad debts	39,710.61
Atlantic City Land Co. stock	32,500.00
Class and Nachod Brewing Co.	15,000.00
Total Deductions	$89,776.54

[fol. k] and stating therein no other items of deductions, and stating no net income for said calendar year, and showing no tax due and payable by him for said calendar year 1935;

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

Second Count

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and charge:

That Enoch L. Johnson, whose full and true name is to the grand jurors unknown, except as aforesaid, late of the City of Atlantic City, State of New Jersey, hereinafter sometimes called the defendant, during the calendar year 1936 and to and including March 15, 1937, was an individual who was the head of a household, and who had one dependent; that during all of said time the said defendant maintained his legal residence and principal place of business in the City of Atlantic City, State of New Jersey, within the First United States Internal Revenue Collection District of New Jersey; that during said time his regular account period was on the basis of the calendar year and not on the basis of a fiscal year; that for the said calendar year the said defendant had, derived and received a gross income of over $5,000, computed in accordance with the Revenue Act of 1936, c. 690, 49 Stat. 1648 (and exclusive of items which, under the provisions of said Revenue Act, shall not be included in gross income and shall be exempt from taxation), to wit, $92,358.19, derived as follows, that is to say:

[fol. 1] Salaries, Wages, Commissions:

Atlantic County Record		$3,950.00	
American Oil Company		2,212.93	
Other Commissions		26,441.08	
		$32,604.01	
Less Expenses:			
Salaries	$2,540.00		
Tax on gasoline	418.48	2,958.48	
			$29,645.53
Numbers Game			62,400.00
Dividends			260.16
Bad debt recovery			52.50
Total Income			$92,358.19

That for and during the said calendar year the said defendant was entitled to and allowed by the said Revenue Act deductions (other than those deductions taken in com-

puting gross income as aforesaid) in the sum of, to wit, $12,128.45, and no more, on account of the following:

Interest paid	$7,600.58
Bad debts	2,556.87
Contributions	750.00
Stock Citizens Budget Co.	1,221.00
Total Deductions	$12,128.45

That accordingly the said defendant had, derived and received for said calendar year a net income (the gross income less the deductions allowed by law), of, to wit, $80,229.74, upon which said net income, after the allowance [fol. m] of all credits to which he was entitled under the provisions of said Revenue Act, he owed to the United States of America an income tax of, to wit, $21,182.17; that by reason of the foregoing facts the said defendant, after the close of the said calendar year and on or before the 15th day of March, 1937, was required to make under oath to the Collector of Internal Revenue for the Collection District aforesaid, at Camden, in the State of New Jersey, within the Judicial District of New Jersey, and within the jurisdiction of this Court, a return for the said calendar year, stating specifically the items of his gross income and the deductions and credits allowed by the said Revenue Act, and the said defendant was further required, on or before the 15th day of March, 1937, to pay at least one-fourth of the amount of tax so due and owing to the United States as aforesaid, to the said Collector of Internal Revenue;

That the said defendant, well knowing all of the foregoing facts, did on, to wit, March 15, 1937, in the State and Judicial District aforesaid, and within the jurisdiction of this Court, wilfully, knowingly, unlawfully and feloniously attempt to evade and defeat a large part of said tax, to wit, $19,957.30, upon his said net income for the said calendar year 1936, and as means of so wilfully, knowingly, unlawfully and feloniously attempting to evade and defeat said tax, did on, to wit, March 11, 1937, in the State and Judicial District aforesaid, make under his oath an income tax return for said calendar year and thereafter, on March 15, 1937, did file and cause to be filed with said Collector of Internal Revenue said income tax return for said calendar year, stating specifically therein the items of his

gross income for said calendar year to have been the sum of $29,958.19, and no more, derived as follows:

[fol. n] Salaries, Wages, Commissions:

Atlantic County Record		$ 3,950.00
American Oil Company		2,212.93
Other commissions		26,441.08
		$32,604.01
Less Expenses:		
Salaries	$2,540.00	
Tax on gasoline	418.48	2,958.48
		$29,645.53
Dividends		260.16
Bad debt recovery		52.50
Total Income		$29,958.19

and stating specifically the items of deductions (other than those taken in computing the amount of gross income aforesaid) allowed to him by said Revenue Act for said calendar year to have been the sum of $12,128.45, on account of the following:

Interest paid	$7,600.58
Bad debts	2,556.87
Contributions	750.00
Stock Citizens Budget Co.	1,221.00
Total Deductions	$12,128.45

and stating therein no other items of deductions, and stating his net income for said calendar year to have been the sum of $17,829.74, and no more, and showing the total tax due and payable by him for said calendar year to have been the sum of $1,224.87, and no more; and he, the said defendant, did thereafter pay to the said Collector the [fol. o] said sum of $1,224.87, and no more, as and for his income tax for said calendar year 1936;

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present and charge:

That ENOCH L. JOHNSON, whose full and true name is to the grand jurors unknown, except as aforesaid, late of the City of Atlantic City, State of New Jersey, hereinafter sometimes called the defendant, during the calendar year 1937 and to and including March 15, 1938, was an individual who was single, and who had no dependents; that during all of said time the said defendant maintained his legal residence and principal place of business in the City of Atlantic City, State of New Jersey, within the First United States Internal Revenue Collection District of New Jersey; that during said time his regular accounting period was on the basis of the calendar year and not on the basis of a fiscal year; that for the said calendar year the said defendant had, derived and received a gross income of over $5,000, computed in accordance with the Revenue Act of 1936, c. 690, 49 Stat. 1648 (and exclusive of items which, under the provisions of said Revenue Act, shall not be included in gross income and shall be exempt from taxation), to wit, $96,140.28, derived as follows, that is to say:

[fol. p] Salaries, Wages, Commissions:		
Mays Landing Record	$ 3,970.00	
American Oil Company	1,749.65	
Other commissions	30,189.99	
	$35,909.64	
Less Expenses:		
Salaries paid	$2,540.00	
		$33,369.64
Numbers Game		62,400.00
Dividends		165.50
Interest		73.94
Capital Loss		(6.30)
Bad Debt Recovery		137.50
Total Income		$96,140.28

That for and during the said calendar year the said defendant was entitled to and allowed by the said Revenue

Act deductions (other than those deductions taken in computing gross income as aforesaid) in the sum of, to wit, $20,891.03, and no more, on account of the following:

Contributions	$ 463.00
Interest paid	3,779.93
Taxes	148.18
Bad debts	16,499.92
	$20,891.03

That accordingly the said defendant had, derived and received for said calendar year a net income (the gross income less the deductions allowed by law) of, to wit, [fol. q] $75,249.25, upon which said net income, after the allowance of all credits to which he was entitled under the provisions of said Revenue Act, he owed to the United States of America an income tax of, to wit, $19,611.12; that by reason of the foregoing facts the said defendant, after the close of the said calendar year and on or before the 15th day of March, 1938, was required to make under oath to the Collector of Internal Revenue for the Collection District aforesaid, at Camden, in the State of New Jersey, within the Judicial District of New Jersey, and within the jurisdiction of this Court, a return for the said calendar year, stating specifically the items of his gross income and the deductions and credits allowed by the said Revenue Act, and the said defendant was further required, on or before the 15th day of March, 1938, to pay at least one-fourth of the amount of tax so due and owing to the United States as aforesaid, to the said Collector of Internal Revenue;

That the said defendant, well knowing all of the foregoing facts, did on, to wit, March 15, 1938, in the State and Judicial District aforesaid, and within the jurisdiction of this Court, wilfully, knowingly, unlawfully and feloniously, attempt to evade and defeat a large part of said tax, to wit, $18,759.10, upon his said net income for the said calendar year 1937, and as means of so wilfully, knowingly, unlawfully and feloniously attempting to evade and defeat said tax, did on, to wit, March 15, 1938, in the State and Judicial District aforesaid, make under his oath an income tax return for said calendar year and thereafter, on said March 15, 1938, did file and cause to be filed with said Collector of Internal Revenue said income tax return for said calendar

year, stating specifically therein the items of his gross income for said calendar year to have been the sum of $33,740.28, and no more, derived as follows:

[fol. r] Salaries, Wages, Commissions:

Mays Landing Record	$ 3,970.00	
American Oil Co.	1,749.65	
Other commissions	30,189.99	
	$35,909.64	
Less Expenses:		
Salaries paid	2,540.00	
		$33,369.64
Dividends		165.50
Interest		73.94
Capital Loss		(6.30)
Bad Debt Recovery		137.50
Total Income		$33,740.28

and stating specifically the items of deductions (other than those taken in computing the amount of gross income aforesaid) allowed to him by said Revenue Act for said calendar year to have been the sum of $20,891.03, on account of the following:

Contributions	$ 463.00
Interest paid	3,779.93
Taxes	148.18
Bad debts	16,499.92
	$20,891.03

and stating therein no other items of deductions, and stating his net income for said calendar year to have been the sum of $12,849.25, and no more, and showing the total tax due and payable by him for said calendar year to have been the sum of $852.02, and no more; and he, the said [fol. s] defendant, did thereafter pay to the said Collector the said sum of $852.02, and no more, as and for his income tax for said calendar year 1937;

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

Charles M. Phillips, United States Attorney.

A true bill: —— ——, Foreman.

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* * * * * * *

[fols. 1-240] In United States District Court, District of New Jersey

On Indictment No. 3?0c

United States of America

v.

Enoch L. Johnson, Defendant

Bill of Exceptions—Filed August 27, 1941

* * * * * * *

[fols. 241-242] Maie Paxson, called and sworn as a witness in behalf of the government, testified as follows:

Direct examination.

By Mr. Burns:

Q. Miss Paxson, do you know the defendant, Enoch L. Johnson?

A. Yes, I do.

Q. How long have you known him?

A. I have worked for him for 19½ years.

Q. In what capacity have you worked for him?

A. As a secretary and clerk.

Q. Has that been as his personal secretary or in connection with some office he holds?

A. Both.

* * * * * * *

[fol. 243] Q. Now, each year when it came time to make up the federal income tax return, did you assist in any way in either preparing that return or giving information from which it was prepared?

A. Yes, I would make a statement from the records of mine that I had in the office as to any income that had passed through my hands and then during all through the [fol. 243a] year there were times Mr. Johnson would send me slips that he was very particular that they be kept so an accurate and true return could be made of his income, and he would send slips up dated with various amounts on to be kept together so that they could be declared in his income tax.

Q. What did you do with those at the time the income tax was made up?

A. I would take them down and give them to Mr. Johnson when he was giving information to Mr. Bewley.

[fols. 244-245] Q. Well, now, will you tell us just what took place when Mr. Johnson's returns were being prepared; that is, who was present when this information was being discussed?

A. Mr. Bewley, Mr. Johnson and myself, and either Judge Jeffers or the secretary of Judge Jeffers. They handled some mortgages and things of that character which I didn't handle in a legal way. Miss Faque would have or Judge Jeffers a complete record of their figures and as I tell you I would have a statement from my records together with Mr. Johnson's slips, and Mr. Bewley would sit down and compute them all with Mr. Johnson's information.

Q. Now, on these slips that you said Mr. Johnson sent to you, will you state what was on those slips?

A. Dates and amounts.

Q. Nothing else?

A. Nothing else.

Q. Do you know what those slips represented?

A. Income.

Q. Do you know from what source?

A. No, I have no idea.

* * * * * * *

[fol. 246] Q. There is also reported on this income tax return for 1935, commissions, $23,245.59. Did you keep a record of that item?

A. That was no doubt the cash that I had on slips, I am not able to tell you. I would have no way of knowing what those slips amounted to, Mr. Burns, other than the fact that I had them and turned them over.

Q. You say you had slips that you turned over to Mr. Bewley with reference to these commissions?

A. That's right.

Q. Well, do you recall whether or not the total of your slips totaled the amount that Mr. Bewley put on the return?

A. Well, they varied in amounts when I got them; I wouldn't be able to tell you exactly what they were, how much.

Q. No, but do you say in making up these income tax returns with Mr. Bewley present you gave him a group of slips which when totaled up amounted to what he put on the income tax return as commissions?

A. Well, I know it amounted to several thousand dollars but just what it was complete I don't know.

Q. Well, do you know whether it amounted to the $23,000 figure on the return?

A. Well, I would imagine that it did.

[fol. 247] Q. But you are not sure?

A. Not exactly in figures.

* * * * * *

Q. Now, can you state what the source of these commissions is that is reported, $23,245.59?

A. I said that they were slips that Mr. Johnson had sent to me, Mr. Burns. They just merely gave the date and the amount. I kept them together.

[fol. 248] Q. Do you know whether any of that money was protection money from the numbers game?

A. I have no idea where he got his income from.

* * * * * * *

Q. I show you exhibit G-2, which is the 1936 income tax return of the defendant and I call to your attention an item of income, Atlantic County Record, $3,950. Is that an item for which you kept records and made deposits?

A. Yes, it was.

* * * * * * *

Q. And I show you an item for commissions, $26,441.08. Is that an item for which you kept records?

A. That would again be among the slips.

Q. And do you know whether or not the slips that you had totaled the amount shown on the returns?

[fol. 249] A. I say that they were varying in amounts but whether it was the exact total I don't know. Mr. Bewley would have to tell you that.

Q. Well, did you give Mr. Bewley or Mr. Johnson in Mr. Bewley's presence a series of slips which Mr, Bewley added up to obtain the figure for commissions?

A. I would lay them on the table while Mr. Johnson and Mr. Bewley were discussing the makeup of the income tax and when my part was finished as I told you before we just paid no attention to what they were doing.

Q. Well, do you know whether or not the figure that is on the return is related to those slips that you gave to Mr. Johnson or Mr. Bewley?

A. Yes, I know that they are.

[fol. 250] Q. And did you see Mr. Bewley take them and add them up?

A. Yes, I did.

Q. Was that his practice each year?

A. Yes, it was.

Q. You are sure of that?

A. Definitely.

. . . . . .

Q. I show you exhibit G-3, which is the 1937 income tax return of Enoch L. Johnson, and I call to your attention in schedule A the report, income, Mays Landing Record, $3,970. Can you state whether or not that is an item for which you kept records and made deposits?

A. I kept records at all times of the Atlantic County Record account.

. . . . . .

[fol. 251] Q. The return also reports other commissions, $30,189.99. Is that an item for which you kept records?

A. Yes, Mr. Burns, that again would be the slips Mr. Johnson sent to me for safekeeping.

Q. Do you know whether they total approximately the figure on the return?

A. I would say somewhere around it. I couldn't say definitely.

Q. You say that those slips were given by you to Mr. Johnson and Mr. Bewley and computation was made?

A. That is right.

Q. And you say without being able to recall the exact

amount that in each year the figure of commissions or other commissions was made up from slips that you had kept for Mr. Johnson?

A. That is correct.

Q. And they were totaled by Mr. Bewley and put on the return?

A. That is right.

Q. You are sure of that?

A. Yes.

* * * * * * *

[fols. 252-258] Q. Now, in each of those three years where there was an item of commissions ranging from $23,000 to $30,000 for which you say you kept slips, do you know the source of that income?

A. No, I do not.

Q. Do you know whether for the years 1936 and 1937 any of that income came from protection, protecting the numbers game?

A. No, I do not.

[fol. 259] JOHN M. BEWLEY, called and sworn as a witness in behalf of the government, testified as follows:

Direct examination.

By Mr. Burns:

Q. Mr. Bewley, are you an accountant?

A. Yes.

Q. Did you practice your profession during the past ten years or so?

A. Since April 15, 1929.

Q. Have you done any work for the defendant in connection with his income tax returns?

A. Yes.

Q. Just what work have you done for him?

A. I prepared his income tax returns beginning with the year 1933 up to date.

Q. Now, particularly with reference to the years 1935, 1936 and 1937, will you tell us the manner in which you prepared his returns?

A. Well, Miss Paxson would call me up and say "Mr. Johnson is ready to make out his income tax return," and

would ask me to be at his home or at his office at a certain hour either that night or at some future date and I would be there and Mr. Johnson would be there and Miss Paxson and sometimes Miss Faque and Judge Jeffers—sometimes the Judge would not be there. And then we would gather [fol. 259a] around the table and Miss Paxson would give me the data that she had collected for the year and Miss Faque would give me the sum that had passed through Judge Heffers' hands and then Miss Paxson would bring out an envelope containing his slips of paper with the amounts of income on it.

[fol. 260] Q. Now, I want to show you exhibit 1, which is the 1935 income tax return of the defendant, and I want to ask you if that is in your handwriting?

A. Yes, sir.

* * * * * * *

Q. This item commissions, $23,245.59, where did you get [fol. 261] that information?

A. I got that as total of these slips that I added up. I took the slips out of the envelope and called off the amounts to Mr. Johnson. I said, "Where is this from?" He said, "That is from commissions." I put it down on the work sheet. When I got through putting those down I would add them up and that was the total of the amount added up on that work sheet.

Mr. Burns: If the Court please, the government claims surprise and asks permission to cross examine this witness.

Mr. Winne: Will counsel state in what manner he is surprised?

Mr. Burns: Yes. I state the last answer given is contrary to what we expected and contrary to what we had previously been told by the witness.

Mr. Winne: Then I submit the practice is to direct the witness' attention to the former statement.

The Court: You may do so.

Q. Mr. Bewley, did you testify before the Grand Jury here in Camden on or about June 10, 1941?

A. Yes, sir, I was called here.

Q. At that time were you asked questions similar to those I have directed to you here?

A. You asked me if I know where they came from, these [fol. 262] amounts.

. . . . . .

Q. Were you asked at that time this question, and did you make the following answer:

"Q. I show you the 1935 return and ask you if you prepared that?

"A. I did."

Did you make that answer?

A. I did.

[fol. 263] Q. Then were you asked this question:

"Q. The commissions of $23,245.59, from where did you get that information?

"A. It was the same as the other year."

Is that correct?

A. Yes, you had asked me previously about '33 and '34, or '36 and '37, I don't know. That is why I gave you that answer.

Q. And you stated that you got the information the same as you had in the other years asked you?

A. Yes, sir.

Q. Now, when you were asked about the other years, weren't you asked this question:

"Q. On this 1940 return there is an item of other commissions, $12,150. From what information did you prepare that figure?

"A. That was from Mr. Johnson's own statement that he had received that amount as other commissions.

"Q. Did he give you that as a total figure or did he give you smaller amounts which you added up?

"A. No, he gave me that as a total figure.

"Q. Did he show you any sort of record or memorandum as a basis for the figure?

"A. No, not for that figure, no sir.

"Q. In other words, he just gave you an oral statement that he had other commissions of $12,150?

[fol. 264] "A. That is right."

Now, did you make those answers to those questions?

A. I must have made them, yes, sir. That was in 1940.

Q. Were you asked this question:

"Q. For the year 1935, did you prepare the income tax return?

"A. Yes, sir."

A. I did.

Q. Were you asked this question:

"Q. That reports other commissions of $21,450.

What information did you have as to that figure?

"A. That same information as 1940. He told me a lump sum of other commissions.

"Q. He gave you no breakdown of the figure?

"A. No."

Did you make those answers to those questions?

A. I don't remember those questions in regard to '35, no, sir.

Q. That was '39 I just asked you.

A. You said '35.

The Court: You did say '35.

Q. I am sorry. I will repeat them. They are with respect to the year 1939. I am reading the question:

Q. For the year 1939 did you prepare the income tax return?

[fol. 265] "A. Yes, sir.

"Q. That reports other commissions of $21,450. What information did you have as to that figure?

"A. The same information as 1940. He told me a lump sum of other commissions.

"Q. He gave you no breakdown of the figure?

"A. No."

Did you give those answers?

A. I don't remember giving those answers, no, sir, I do not, because every year he had slips and I totaled those slips up and put them down here on the returns.

Q. Were you asked this question:

"Q. For the year 1938 did you prepare this return?

"A. Yes, sir.

"Q. That reports other commissions of $28,431.67.

From what information did you get that figure?

"A. That is the same information as the other two years. It was a lump sum that he had given me."

Did you make those answers?

A. I don't ever remember using the word "a lump sum" in my life before the Grand Jury.

Q. Do you deny that you made the answer before the Grand Jury: "It was a lump sum that he had given me"?

A. I will, yes, sir.

Q. You deny that answer?

[fol. 266] A. Yes, sir.

Q. Now, were you asked these questions before the Grand Jury and did you make the following answers:

"Q. I show you the 1937 return. Did you prepare that?

"A. Yes, sir.

"Q. That reports other commissions $30,189.99. From what source did you obtain those figures?

"A. From the same source as the other three years."

Did you make those answers to those questions?

A. I probably did but I don't remember saying ever "a lump sum" that he gave me.

Q. Well, now, before you denied that you said with respect to '38 this was a lump sum. Now do you deny it or say that you don't remember?

A. I deny saying that it was a lump sum that he gave me, yes, sir.

Q. Now what do you say; you did say it to the Grand Jury or you did not, that it was a lump sum?

A. I deny saying it.

Q. Were you asked these questions and did you make the following answers:

"Q. I show you 1936 return. Did you prepare that?

"A. Yes, sir.

"Q. That reports other commissions $26,441.08.

[fol. 267] From what source did you get that figure?

"A. That was the same proposition as the other years. He gave that to me in one lump figure."

Did you make that answer to the Grand Jury?

A. No, sir, I did not.

Q. Now I would like to repeat the question I previously asked.

"Q. I show you the 1935 return and ask you if you prepared that.

"A. I did.

"Q. The commissions are $23,245.59. From where did you get that information?

"A. It was the same as the other years."

Did you make those answers?

A. I may have said it but I deny saying that that was given to me in a lump sum.

Q. Were you asked this question and did you make the following answer:

"Q. For the years 1935 to 1940 inclusive, these figures that you put on the returns for other commissions were a total figure each year given to you by Mr. Johnson?

"A. That is right."

Q. Did you make that answer?

A. Yes, but——

Q. Well, was it true?

[fols. 268-270] A. May I explain it to you?

Q. First was it true?

A. It is true.

The Court: You may explain.

A. (Continuing:) The procedure was to add up those figures, the slips that we had made and then I passed them over to Mr. Johnson and he said, "That is my correct income", he said, "You can put that on the return". And that was the same procedure in every year. I added up those slips that he had given me and the total I put on the income tax return was the other commissions after Mr. Johnson had O. K.'d it.

Mr. Burns: That is all.

* * * * * * *

[fols. 271-276] Q. Did Mr. Johnson tell you that he recived any money from the numbers game?

A. No, sir.

* * * * * * *

[fol. 277] MAIE PAXSON, recalled:

Direct examination.

By Mr. Burns:

Q. Miss Paxson, what kind of slips did Mr. Johnson give you that you kept until the end of the year?

A. Little slips of paper like on a pad.

Q. And those are the slips which you gave to Mr. Johnson or Mr. Bewley from which was computed these other commissions shown on the income tax return?

A. I handed them in. I do not know what they did with them. I know that they added them up.

Q. How often did you receive them from Mr. Johnson?

A. Frequently during the year. Maybe twenty or thirty times during the year.

Q. And you say they added up to substantially the amount shown on the income tax returns?

A. I do not know whether they added up to the amount shown on the income tax. I say they were all substantial amounts.

Mr. Burns: If your Honor please, the government claims surprise and asks permission to cross examine this witness.

The Court: You may proceed.

Cross-examination.

By Mr. Burns:

Q. Miss Paxson, did you appear before the grand jury [fol. 278] in this building on or about June 10, 1941?

A. Yes, I did.

Q. At that time were you asked these questions, and did you make the following answers? I will read a series of them and then stop and give you an opportunity to say whether you made these answers?

The Court: Mr. Burns, I think you may hand a copy of this to Mr. Winne, and perhaps you might also have it marked as an exhibit.

Mr. Burns: I would like to have it marked G-5 for identification.

(Testimony referred to marked G-5 for identification.)

[fol. 279] Q. Were you asked these questions and did you make the following answers:

Mr. Winne: From what page are you reading?

Mr. Burns: Page 4, half way down.

"Q. Did he send you any other memorandum as to income that he received?

"A. Once in a while I would get a little slip, for instance, declare an income tax. That was on the slip,

whatever amount, and we keep an income tax envelope, a Manilla envelope, in the drawer, for anything pertaining to income and that is kept in it, so at the time we make up the income tax we have whatever record we need.

"Q. Let us go into this memorandum he would send. Would there be a date and amount on the slip?

"A. That is correct.

"Q. Would there be any indication of the source of that income?

"A. No.

"Q. Do you recall what some of these amounts were, approximately?

"A. No, I really do not.

"Q. What the range would be?

"A. No, I really do not remember, Mr. Frank.

"Q. Would it be something like $2000 or $5000, $200?

[fol. 280] "A. I do not know why there is just one amount I happen to remember that for, I think, $1700. I do not know why that comes to me but I would have to bring up the slips to truthfully tell you what came.

"Q. You keep these slips for Mr. Johnson, during the course of the year, is that correct?

"A. Anything that he sends to me, I keep in this envelope, so at the time when Mr. Bewley would make it up we have any memorandum at all pertaining to it."

Do you recall making those answers to those questions?

A. Yes, I do, Mr. Frank,—Mr. Burns.

Q. Are those correct answers?

A. They are.

Q. Were you asked these questions and did you make these answers:

"Q. Did you receive these memoranda of income from Mr. Johnson regularly?

"A. Oh, no, Mr. Burns. I mean maybe once or twice in a year I might get a slip up."

A. Oh, no.

Q. Just let me finish.

"—I mean maybe once or twice in a year I might get a slip up."

Did you make that answer?

[fol. 281] A. No.

Q. You did not make that answer to the Grand Jury?
A. No.
Q. Were you asked this question and did you make this answer:

"Q. What I mean particularly is this, did he give you a slip or some kind of statement each week showing what he had received?
"A. Oh, no; oh, no."

Did you make that answer to that question?
A. I didn't get that weekly. That is correct.
Q. That is correct?

The Court: Did you make that answer, that is what Mr. Burns asks you.
A. Well, will you repeat that, please?
Q. Yes, the question is this:

"Q. What I mean particularly is this, did he give you a slip or some kind of statement each week, showing what he had received?
"A. Oh, no; oh, no."

Did you make that answer?
A. I did.
Q. Was that correct?
A. That is correct.
Q. Were you asked this question and did you make the [fols. 282-285] following answer:

"Q. How often did you get these slips?
"A. As I say, maybe once, twice, maybe three times a year, maybe not that."

Did you make that answer to that question?
A. No, not in a year.
Q. Did you make that answer to that question?
A. No.
Q. You did not?

The Court: You understand the question Mr. Burns is asking there?
The Witness: Yes, I do, Judge, he is asking if I said, I think——
The Court: He is asking you whether you made that answer to that question.

The Witness: No, I didn't. If I did I didn't understand the answer, or the question, by you and the Grand Jury because that is not true.

. . . . . .

[fol. 286] Q. Were you asked this question:

"Q. Take the year 1939. We will go backwards. We have in that return other commissions $21,450. Is that a figure which you made up from slips you got or something Mr. Johnson gave Mr. Bewley?

"A. I never had anything to do with these other commission accounts other than if I had a slip or two, but that never amounted to anything like this."

Did you make that answer to that question?

A. I don't know whether I said that. What I meant to infer, I don't know whether I said those exact words, Mr. Burns,—I told you, if I may, Judge, explain.

[fol. 287] The Court: You may.

A. (Continuing:) While I was in the Grand Jury room and you asked me if I knew anything about Mr. Johnson's other commissions, I told you that I did not, that slips came up from time to time which I kept in this envelope and they were turned back to Mr. Bewley at the time that the income taxes were made up. You asked me if I could definitely tell you the amounts that were on those slips. I told you I couldn't remember the definite amounts that were on those slips. You asked me if it would amount up or if it were these figures. I told you that I had nothing to do with Mr. Johnson's income other than the checks that came through me other than these slips that he sent to me for safekeeping and to bring back at the time the income tax was made up. You asked me, if my memory is right, how often I got them. I told you infrequently. When you asked me if I got them each week, I did not get them each week.

Now, that is my recollection of your questioning of me and what I tried to infer to you when you asked me if I remembered certain things definitely. I told you I couldn't definitely remember as to amounts.

[fol. 288] Q. Did you make this answer:

"I never had anything to do with these other commissions, accounts other than if I had a slip or two, but they never amounted to anything like this."

Now, did you make that answer?

A. I never said a slip or two.

The Court: Did you make that answer?

The Witness: I don't remember making it, Judge, in that manner.

Q. Were you asked this question and did you make the following answer:

"Q. You have no knowledge except you happened to be present when the figures were given to Mr. Bewley?

"A. That is right."

. . . . . .

[fol. 289] Q. I will read you three questions and answers which appear on page 9 of the transcript.

"Q. You have no knowledge except you happened to be present when the figures were given to Mr. Bewley?

"A. That is right.

[fol. 290] "Q. You did not know what they were?

"That is right, I had no idea.

"Q. Is the same true for every year from 1935 to 1940, inclusive?

"A. That is right."

Now, did you make those answers?

A. I did, Mr. Burns, but you asked me then if I knew where Mr. Johnson got his income from and I told you no, that I didn't; and you asked me why I didn't hear Mr. Johnson tell Mr. Bewley where he got his commissions from and I told you no. And you said "Well, you were sitting there listening to them; didn't you ever hear Mr. Johnson tell you where he derived his income from?" And I told you no. That is what in those questions you certainly were asking me, if I knew where he got his money from because that is what you asked me.

Q. Well, did Mr. Johnson show Mr. Bewley any records or slips to make up these other commissions?

A. Yes, I took the slips down with me. We have every year.

Q. Do you say that Mr. Johnson did show them to Mr. Bewley?

A. Yes.

Q. Well, now, before the grand jury were you asked this question and did you make the following answer on [fol. 291] page 10:

"Q. When Mr. Johnson was stating to Mr. Bewley that he received commissions did he show Mr. Bewley any kind of record or slip, or did he just tell him 'I received so much'?

"A. Well, I would not know. You would have to ask Mr. Bewley about that."

A. That is right.

Q. Did you make that answer to that question?

A. I just explained that, yes. You asked me if I heard Mr. Johnson tell Mr. Bewley where he got his income from and I told you no that I never heard him tell Mr. Bewley and if Mr. Bewley knew you would have to ask Mr. Bewley.

[fol. 292] Q. Suppose you listen to the question:

"Q. When Mr. Johnson was stating to Mr. Bewley that he received commissions, did he show Mr. Bewley any kind of record or slip?"

A. What was my answer?

Q. The rest of the question was:

"Or did he just tell him 'I received so much?' "

Now, you do not see in that question anything as to the source of the income, do you?

A. That was my understanding of you, Mr. Burns, when you were questioning me in the grand jury room, because we took our records there and laid them on the table and when I got finished explaining my statement to Mr. Bewley and Miss Paque got finished explaining her statement we would go and sit somewhere else, as I told you in the grand jury room we talked together and that is the reason I did not hear Mr. Johnson talk with Mr. Bewley or know what was being done at the table.

The Court: Did you understand this question to ask whether you heard any conversation?

The Witness: Yes.

The Court: Will you read it again?

Mr. Burns: "When Mr. Johnson was stating to Mr.

[fols. 293-677] Bewley that he received commissions did he show Mr. Bewley any kind of record or slip."

A. I do not say that. I saw the records, they were right there because I laid them on the table. I do not know whether I saw Mr. Bewley pick them up or Mr. Johnson pick them up. They were on the table when they were making up the income tax.

Mr. Winne: I think this question and answer ought to be completed.

The Court: Yes, I think you ought to complete the question and answer.

Mr. Burns: I have read it three times.

The Court: Read it again and then ask the witness whether she did make that answer.

Mr. Burns: "When Mr. Johnson was stating to Mr. Bewley that he received commissions, did he show Mr. Bewley any kind of record or slip, or did he just tell him 'I received so much.'

"A. Well, I would not know. You would have to ask Mr. Bewley about that."

Now, did you make that answer to that question in the grand jury room?

A. I guess I did.

Mr. Burns: That is all.

[fol. 678] BENJAMIN RAVINSKY

• • • • • • •

Q. And who was chosen to manage and operate the syndicate?

A. Myself, Rubenstein, Leroy Williams and James Towhey.

Q. How were the duties divided up amongst you, Mr. Ravinsky?

A. Rubenstein was the floor man who took charge of all [fols. 679-687] the slips; Weloff, not Weloff, excuse me, Towhey and Williams would sit at the table and take care of the sheet, the business sheet, and I was the cashier.

Q. What was your job as cashier?

A. I collected the money from the seven different banks.

• • • • • • •

[fol. 688] Q. Will you state what the gross annual business was that was done in the years 1936 and 1937, that is the approximate figures?

. . . . . .

[fol. 689] Q. How many days a year did you operate?

A. About 312 days.

Q. That would be roughly 300 times 6,000, about $1,800,000, is that correct?

A. Yes, that is what it would be.

Q. On these sheets that were kept daily were the expenses recorded?

A. They were.

Q. Will you state some of the expenses that were on the sheet?

A. There was one expense on the sheet which would go on on a Monday.

Q. How much was that?

A. $1200.

Q. What was that for?

A. That was for protection.

Mr. Winne: When did he say?

Mr. Burns: The first thing on Monday morning.

The Court: It would go on on Monday he said. That was every week?

The Witness: Every Monday.

Q. Who paid out that $1200 each week?

A. I did.

Q. You were the cashier who paid those expenses?

A. I was.

[fols. 690-691] Q. Starting at the beginning of 1935, when this syndicate was formed was there any——

The Court: Do you mean the middle of 1935? You said the beginning of 1935.

Mr. Burns: I got my sentence started and then did not finish it.

Q. At the beginning of the formation of the syndicate, which was in the middle of 1935, around July 1st, was any person or persons designated to handle this protection money?

A. There was.

Q. Who was designated to handle it?
A. Ralph Weloff and Mr. Towhey.
Q. Was this paid every week?
A. It was.

Mr. Winne: Did you say paid every week?
Mr. Burns: Yes.
Mr. Winne: May I know to whom and by whom?
Mr. Burns: That is the next question.
The Court: To whom did you pay the money?
The Witness: Mr. Weloff or Mr. Towhey. They alternated. One week Weloff and the next week Towhey.
The Court: I suppose you paid it to them and that was the last you saw of it yourself?
The Witness: Yes.

. . . . . .

[fol. 692] Q. Was there any change in the person who handled this collection money?
A. There was a change.
Q. Will you state, as near as you can recall, when that took place?
A. The last of October or the beginning of November of 1937.
Q. And what happened at that time?
A. They took it away from Weloff and gave it to Martin Michael.
[fol. 693] Q. Among the partners in this syndicate what name did you call Michael by?
A. Jack Southern.

The Court: What about Towhey, did he continue?
The Witness: No, they took it away from Weloff and Towhey.
The Court: By "they" you mean——
The Witness: All of us.
The Court: Your partners, you bankers in this syndicate?
The Witness: That's right, took it away from them.

Q. Did you have a meeting about that?
A. We had a meeting in Jack Southern's horse room in the 600 block, Atlantic Avenue, 623½.
Q. And after it was taken away from Weloff and Towhey and given to Southern who did you give the $1200 to each week?
A. Jack Southern.

Q. And did you continue to give it to Southern for some time thereafter?

A. I did.

Q. Will you state whether or not this $1200 was paid every week?

[fols. 694-695] Q. Did you pay that in weeks when the syndicate lost money?

A. We did.

. . . . . .

[fol. 696] Q. Mr. Ravinsky, were any of the numbers bankers arrested during these three years?

A. There were not.

Q. Was this headquarters ever raided by the police where you had these adding machines and this big business?

A. There was not.

Q. Were any of your separate offices ever raided where the bankers brought in their slips?

A. No, there was not.

Q. Well, who was arrested during this period?

A. The storekeepers.

Q. You mean the writers, the storekeepers?

A. Yes, sir.

. . . . . .

[fol. 696a] RALPH WELOFF, called and sworn on behalf of the government, testified as follows:

Direct examination.

By Mr. Burns:

Q. Mr. Weloff, will you please face the jury and talk so the last juror can hear you. Do you live in Atlantic City?

A. I do.

[fol. 696-1] Q. How long have you lived in Atlantic City?

A. About thirty-five years.

Q. Were you in business in Atlantic City?

A. I was.

Q. Did you have a cabaret in Atlantic City?

A. I did.

Q. How long did you have that?

A. Twenty-six years.

Q. Did you in 1932 or 1933 go into the numbers business in Atlantic City?

A. I did.

Q. Were you a partner of James F. Towhey?

A. I was a partner of James F. Towhey, Max Weloff and,—Max Weloff, Jim Towhey, Dave Abrams and myself, four of us.

Q. Four of you?

A. Yes.

* * * * * * *

Q. Now, before you went into this numbers business with your partners in 1932 or 1933, did you know the defendant, Enoch L. Johnson?

A. I did.

Q. How long have you known him?

A. Why, about twenty-five years.

Q. And what was the nature of your association with him?

A. Well, I had met Mr. Johnson around at different events, political gatherings, social gatherings, he had visited in our place of business numerous times.

Q. By place of business you mean this cafe?

A. Cafe. I met him at public gatherings.

Q. Now, when you started in this numbers business did your bank pay any protection?

[fol. 696-2] Mr. Winne: I object to that unless it is connected with the defendant.

Mr. Burns: If they didn't pay it couldn't be connected. Why object?

The Court: He may answer yes or no.

Mr. Winne: I think it is immaterial if they did unless it is connected.

The Court: I will permit the question.

Mr. Winne: Your Honor will allow an exception?

The Court: Exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly. (Sealed.)

Answer yes or no.

The Witness: The question is when we first started?

The Court: Read the question.

Q. (Question read.)

Mr. Winne: You see the iniquity in it, if the Court please, is it permits a witness to make a conclusion which might not be justified if the facts were known. I think if they paid somebody there ought to be an offer of whom they paid and what they got for it. It says paid protection. [fol. 696-3] After all, they might have given it to the cop on the corner, or they might have given it to the Democratic Party or the Republican Party, or they might have gotten results and they might not have. This witness concludes that he did get protection. I think there is something in that word that implies a conclusion that ought not to be raised with the defendant, it should be a conclusion as a legal matter, the facts being stated.

Mr. Burns: May the witness not state what he got for what he gave?

The Court: Answer the question and then we will see where we get from there.

The answer is yes or no.

A. When we first started?

Q. When you first started were you paying protection or not? Yes or no.

A. When we first started we didn't pay.

Q. Now, after you were operating for a while did you pay any protection?

The Court: Now, Mr. Burns, let us get down to 1935.

In the first part of 1935 were you making any payments which you would have described as for protection?

The Witness: Yes, sir.

Q. To whom were you making the payments?

A. In 1935?

Q. Yes, in the first part of 1935.

The Court: Say January.

[fol. 696-4] Mr. Burns: Well, I have to start that over again because there are two different capacities here.

The Court: All right.

Mr. Burns: I will start in 1935 and then go back.

The Court: All right.

Q. In 1935 did you give, the first part of 1935, did you give the defendant any money?

A. I did.

Q. Did you give it to him at any regular periods?

A. Every week.

Q. How much did you give him each week?

A. At that time there were six banks, six individual banks.

The Court: You are talking about numbers banks?

The Witness: Numbers banks, that were paying $125 apiece.

Q. Those were day banks?

A. Those were day banks.

Q. Was there a night bank?

A. There was a night bank.

Q. How much was that paying?

A. That bank paid $75 a week.

Q. A total of $825?

A. That is right.

Q. Did you give $825 to Mr. Johnson?

A. I did.

Q. The first few months in 1935 how often did you give it to him?

[fol. 696-5] A. Weekly.

Q. What was it for?

A. Protection.

Mr. Winne: Objected to, objected to, if the Court please. Let us hear what was said.

The Court: All right. Ask the witness what was said.

Q. In 1935——

Mr. Burns: Now can we go back?

The Court: Or any time when this practice started, of course. We would have to have that.

Q. When did you start bringing that money to the defendant?

A. It was about the latter part of 1933 or the early part of 1934.

Q. Now, will you tell us how you happened to start taking that money to Mr. Johnson?

A. It seemed like the individual backers had talked it over, they had different meetings about it, and they finally decided they thought they would like to pay for the privilege, and after several discussions and meetings about the matter, they felt as though they could pay $125 a week. The

last meeting that was held about this, I was asked by Mr. Abrams, my partner, to handle that money, that is, to take it to Mr. Johnson, he thought that I could handle it.

Q. You said paid for the privilege, what privilege?

—. These men felt as though they would, they were willing to pay this $125 a week in order to go along without being molested in this business.

[fol. 696-6] Q. Molested by whom?

A. By the police and in order to keep outsiders out of the business.

Mr. Winne: May I understand if this was communicated to the defendant?

The Court: I suppose that will be the next question.

Mr. Winne: If it was not, may I have the privilege of moving to strike it?

The Court: You may ask the United States Attorney now.

The Witness: I was present at the meeting where this was discussed.

Mr. Winne: Mr. Johnson was not present.

The Witness: No.

The Court: Did you discuss the matter with Mr. Johnson?

The Witness: When I received the first money after they held this meeting and decided they could pay this $125, they were willing to pay it and the money was turned over to me, and I carried it down to Mr. Johnson.

Q. Will you try and recall your conversation with Mr. Johnson about the money?

A. My conversation with him at the time was that this was money represented by the numbers backers, that they [fol. 696-7] felt as though they did not want to do this without paying for it and at the same time they wanted to go along without being molested by the police and they wanted to keep outsiders from getting in the business.

The Court: What did Mr. Johnson say:

The Witness: He took the money and thought it would be all right. He said "I understand the situation and I think it will be all right."

* * * * * * * *

Q. Will you state how this $825 a week came into your possession during the year 1935, that is the first part of 1935? In other words, who did you get the money from?

A. It represented $125 from each of these six day banks.

Q. Can you give us the names of those banks? First, we will put down—did your own bank pay?

A. Yes, we paid. We paid, the bank of Towhey and Weloff; Abrams and Weloff; Pete Macrie; Dan Young; Benjamin Ravinsky; LeRoy Williams and Herndon Daniels; Dick Austin; Willie Wolfson and Ed. Weloff. Is that six there?

Q. No, five.

A. Johnny Malia and Benjamin Rubenstein.

Q. They each paid, you say, $125?

A. They paid $125 apiece and then there was a night bank that paid $75.

* * * * * * *

Q. When you started to take this money to Johnson in 1933 and 1934 were you taking money from the night bank too?

[fol. 696-8] A. No, the night bank was not paying.

Q. And sometime later did the night bank start paying?

A. After awhile the night bank began paying.

Q. How much did the night bank pay?

A. The night bank paid $75.

Q. Now, where did you deliver this money to Johnson?

Mr. Winne: May we have the time?

Q. Where did you deliver this money to Johnson from the time you started delivering it until the summer of 1935?

A. It was either at the cottage on S. Iowa Avenue or at the Ritz Carlton Hotel across the way.

Q. Would you tell the jury how you deliver it to him?

A. I usually went down there on a Monday. If he was not there I would go back the following day and I waited around for awhile and if I found Mr. Johnson was in I would wait awhile and after awhile he would appear and I would just give it to him and he would put it in his pocket and say "Thanks."

That is all there was to that.

Q. Just how did you hand it to him, was it cash, in an envelope, or what?

A. I usually put it in an envelope. Give it to him in an envelope.

* * * * * * *

Q. The last question is withdrawn. I will put a more direct question. Do you know Ralph Gold?

A. I do.

Q. Now, in 1934 and 1935 what was his position?

A. Head of the Vice Squad.

Q. Was he in the police department?

[fol. 696-9] A. Head of the Vice Squad connected with the police department of Atlantic City.

Q. When there were arrests of numbers writers or pick-up men did you talk to Ralph Gold?

A. Well, usually when there were arrests there was so many arrests.

Mr. Winne: Your Honor, I believe the question can be answered yes or no.

The Court: Yes.

A. I did. I talked to Ralph Gold.

Q. Did any of the numbers backers talk to you when there were too many arrests?

A. They usually complained to me about the arrests.

Mr. Winne: I think that too could be answered yes or no.

The Court: They did, they talked to you in those cases?

The Witness: They complained to me about it.

* * * * * * *

Q. When the complaints were made to you by the numbers men did you go to Ralph Gold?

A. Whenever there was too many arrests made these backers usually came to me and complained to me about them. I took those complaints to Ralph Gold.

* * * * * * *

[fol. 696-10] Q. Then what happened?

The Court: What would happen after that?

Q. (continuing) As far as the arrests were concerned.

A. The complaints were about too many arrests.

Mr. Burns: Let the jury hear it.

A. Well, the complaints were about too many arrests. After I complained to him they had slowed up, eased off.

The Court: You mean the police eased up on arrests?

The Witness: The police eased up and the arrests became fewer and finally there were hardly any at all.

Q. Well, now, sometime in 1935 did your partnership with Jim Towhey end?

A. It did.

Q. About when, as near as you can recall?

A. To the best of my recollection; it was about the, sometime in the latter part of April, sometime in April of 1935.

Q. When the partnership ended, what happened, as far as your numbers business was concerned?

A. I had been away for a while and Mr. Abrams, who was seriously ill at the time, wired me to come home. When I got home he had told me that it looked like we were out of business.

Mr. Winne: I object to what Mr. Abrams told him and ask to have it stricken.

[fol. 696-11] The Court: It is stricken out.

Q. Just tell what happened; in other words, not the conversation.

A. I found when I got back, I found our business was taken away.

Q. By whom?

A. By Mr. Towhey.

Q. When you say the business was taken away, explain to the jury what that was, what that meant. They don't know what the business is; tell them what the business was that was taken away, just how that was done.

A. Mr. Towhey had been one of the active men in running this business that he, I and Mr. Max Weloff and Dave Abrams were connected with, and during the operation of this business, why, he arrived at some idea of his own whereby he could do better with other people than he was doing with us, and without any notice to us he went off with the business, took all the runners, took all the help, took all the business. It was at that time that I had got a call from Mr. Abrams to come back home, he was seriously ill in bed, to see if I couldn't do something about it.

Q. What did you do?

A. I came back and I checked up on the situation and found that was correct, that Mr. Towhey had taken a man by the name of Jack Southern in with him, and they two had gone off with the business.

. . . . . .

After talking with Jack Southern I didn't seem to get anywhere with him, and also made a few attempts with Mr. Towhey about the same matter and didn't get anywhere [fol. 696-12] with either one of them, and after reporting back to Mr. Abrams about it, about the situation, we thought of a plan of trying to get back our business.

Q. Mr. Weloff, at or about that time did you talk to Mr. Johnson?

A. When I couldn't get anywhere with Jack Southern and Mr. Towhey I thought I would go down and talk to Mr. Johnson about it, and I went down and saw him.

Q. Where did you see him, as near as you can recall?

A. Down to the cottage on Iowa Avenue.

Q. What month was that, as near as you can recall?

A. To the best of my recollection, I guess it was about the early part of April, '35.

Q. All right. Will you tell us, as near as you can recall, the conversation you had with Johnson on that matter?

A. I told him that Jim Towhey had taken our business away and declared another man in with it, who had nothing to do with the business, if he couldn't do something about it that would enable us getting back to where we were, and he listened to it, and he finally said he didn't know what he could do about it.

Q. What did you do after that?

A. Two or three days later my brother, Mr. Abrams and myself thought of a plan as to find ways and means of getting back our business. We started out to build, to build a new bank, and tried to get back some of those customers, some of those people that had been writing for us. In order to do that we had to offer special inducements, such as giving the storekeepers a little higher percentage for writing; pickup men and the employees, certain of the boys who picked up the slips, give them better commissions and other inducements, such as $25 and $50 a week to certain stops that seemed to be a little hard to get back. We had to offer those special inducements and finally began getting [fol. 696-13] back that business. It was not a proper way of getting it back but it was the only way we could get back some of the business that belonged to us.

Q. Now, did the other banks do anything to meet your competition offering inducements and raising the percentages?

A. In order for the other banks to hold on to what they had, they had to meet that competition. They raised their odds and percentages to meet ours, and the result was there was quite a turmoil out there. Nobody was making any money.

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Q. Did anything else happen when the competition got to the point of turmoil?

A. During this competition there was quite a, they began making arrests, the police became active again and some of the boys began calling up one another about getting together.

Q. Now, what effect did this competition and the arrests and fines have on the financial side of your business?

A. This competition continued for about six to eight weeks. At the end of that period the financial position of all these banks was pretty well exhausted.

Q. Now, during the period when the police were making arrests, did you take any money to Mr. Johnson?

A. No, they stopped paying during that trouble.

Q. You mean the banks stopped paying you?

A. The banks stopped paying.

Q. Did you take any money to Mr. Johnson?

A. During that trouble?

Q. Yes.

[fol. 696-14] A. I did not.

Q. Did that trouble, was that trouble ended and was the problem settled in 1935?

A. While this competition was on I had received a telephone call from one of these other backers to attend a meeting at a place called Fitzgerald's Hall.

Q. Did you attend the meeting?

A. I did.

Q. Can you give us the approximate date of that meeting?

A. That was July—no, the latter part of June I would say, about the 30th of June, 1935.

Q. Were other numbers backers there?

A. I am sure that all the backers were represented with the exception of one.

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Q. State what happened or what was decided?

A. When I come to this meeting I found out that the purpose of it was to get together, cut out all this competition, to get together where they could make the business profitable.

Q. What was the result of the meeting?

A. As a result of the meeting they definitely decided to get together and form a syndicate.

Q. How many banks agreed to get into this syndicate?

A. Seven.

Q. Was a syndicate actually formed?

A. A syndicate was actually formed that afternoon.

Q. Did the eighth bank later join the syndicate?

A. It did.

The Court: Who was that?

The Witness: Dick Austin.

. . . . . .

[fol. 696-15] Q. After that meeting did you see the defendant Johnson, that is after this meeting where this syndicate was formed?

A. Yes, I did.

Q. Who did you go with?

A. Mr. Towhey.

Q. And where did you go? Where did you see Johnson?

A. Down at his home on S. Iowa Avenue at the cottage.

Q. Will you tell the jury, as near as you can recall, I want you to try to recall as definitely as possible the details of what you told Johnson when you went to see him with Towhey after this meeting at Fitzgerald's Hall?

A. Jim Towhey and I went down there and explained to him what had taken place, that we had decided to get together and cut out all this trouble amongst ourselves, that what we had been doing was not good for anybody, including himself——

Q. Including who?

A. Including Mr. Johnson. That we had decided to get together and that would turn out to be a better arrangement whereby we would all benefit by it in a better manner.

. . . . . .

Q. Just try to recall, as near as you can, if you cannot recall just say so, if you can recall state what you explained to Mr. Johnson about how you would all benefit?

A. To the best of my recollection, we went down there and explained to him by eliminating all this competition that had been going on for these many weeks that we could run this business successfully and make some money, and if we did that we could afford to pay for the protection, pay a certain amount of money to do this.

[fol. 696-16] Q. Now, did you discuss with Mr. Johnson the amount of money you would pay?

A. We did.

Q. What did he say?

A. Well, he said he was pleased that we had gotten together to stop all this because it was not any good, the publicity was not any good for the town, it was not any god for him or anybody else. It was all right with him as long as cut out all this trouble amongst ourselves and could meet that obligation.

Q. What obligation?

A. Of $1200 a week.

Q. What was said about $1200 a week at this meeting?

A. We told him we could pay $1200 a week, $150 a bank. That if this competition was eliminated we could afford to pay $150 a piece for protection.

The Court: How often?

The Witness: Weekly.

Q. Was anything said to Johnson as to who would bring the $1200 to him?

A. I told him that it was decided that instead of one man going down there, myself,—that was the procedure heretofore—that they had decided there would be another man, two men would go down there, that we would alternate, that I would be going down there one week and Mr. Towhey would go down the other week. Towhey and I was to alternate. That was the way they wanted it.

The Court: You mean by "they" these backers?

The Witness: The backers, yes.

[fol. 696-17] Q. After that meeting with Johnson at which it was decided that $1200 would be paid, did the numbers backers have another meeting?

A. They had a meeting, I believe, the following night.

Q. Where was that held?

A. At a place called the Little Belmont hotel.

Q. You say that this syndicate was formed about the end of June or the first of July, is that right?

A. That is right.

Q. Well, did you take any money to Mr. Johnson after that?

A. I did.

Q. How soon after the syndicate was formed did you take money to him, as near as you can recall?

A. As near as I can recall we had this meeting the following night at the Little Belmont and they had decided to put up a certain amount of money and create the sum of money to work with as a bank roll.

Q. How much was that?

A. That was $1500 for each bank. I think that night they had a total of $10,500, which was the bank roll that night. And immediately following, I believe it was the 2d of July they began to operate. That may have been Tuesday or Wednesday of that week. The following Monday was the first time I took the money down to Mr. Johnson.

Q. How much did you take down that Monday?

A. $1200.

Q. Were the eight banks in the syndicate at that time?

A. They were not, I do not think the eighth bank joined up until two weeks later.

Q. Well, do you recall definitely whether you took the $1200 down the first week?

A. The first week?

Q. Yes, before the eighth bank came in?

[fol. 696-18] A. I did not.

Q. That is what I asked, the first week you went down before this last bank came in how much did you take to Mr. Johnson?

A. Before the last bank came in I took down $1050.

Q. And then after the eighth bank came in, how much did you take to Mr. Johnson?

A. Then it was $1200.

Q. Was that a week?

A. That is weekly.

Q. Well, now, after the syndicate started to pay this $1200 a week to Johnson were there any arrests?

A. No, the arrests had stopped.

Q. The arrests stopped?

A. Yes.

Q. In this syndicate how was the money handled, that is whom handled the money for the organization?

A. Benny Ray or Ravinsky was appointed the cashier for the syndicate.

Q. Well, now, who gave you the money that you took to Johnson?

A. Benny Ray.

Q. How long did you and Towhey continue to take this $1200 a week to Johnson?

Mr. Winne: I object, your Honor, please. I don't think there is any proof that Towhey took $1200 a week to Johnson.

Mr. Burns: I will withdraw it.

Q. How long did you continue to take $1200 a week to Johnson?

[fol. 696-19] The Court: That is for the weeks that you went down there, which wasn't every week as I understand it, how long did you keep up this practice yourself.

A. To the best of my recollection at the time I thought it was the Spring of 1936 but then after talking it over with some of the backers and another man Jack Sothern who had established a different time, established a time in November 1937 I went over the matter with some of the boys and we put our notes together and different incidents that happened during that time, and I realized I was wrong and that November 1937 was the right time.

Q. So you alternated with Towhey or at least you took it up on alternate weeks up until about November, 1937?

A. November, 1937.

Q. During this period from July of 1935 until near the end of 1937 where did you deliver the money to Johnson?

A. To the cottage on S. Iowa Avenue. If he wasn't there I found him at the hotel across the way, the Ritz Carlton Hotel.

Q. During these years 1935, 1936 and 1937 were there any occasions when you were away on a vacation or out of town for a period of a few weeks?

A. Yes, there were periods where I had been away.

. . . . . .

Q. Now, what happened near the end of 1937 when you stopped taking this money to Johnson?

A. I received a telephone call about that time to attend a meeting. I didn't know what the purpose of it was, a meeting to be held at 623½ Atlantic Avenue, a place called Jack Sothern's horse room.

[fol. 696-20] Q. Did you attend the meeting?

A. I did.

Q. What happened at that meeting?

A. When I got to the meeting I found all the backers there and I soon found out that—Mr. Rubenstein was the spokesman of the meeting,—he opened the meeting by saying——

Mr. Winne: Now, if the court please, we are back where we were before. If the purpose is to show that was the end of his handling the money and someone else took over I have no objection, but I don't want to let in a lot of conversations.

The Court: Is that the purpose?

Mr. Burns: Yes, to show that is when it was taken away from him.

The Court: Very well.

A. (Continuing:) Rubenstein complained to the men that I had been giving away too much money to different charitable contributions. That I had been too liberal with their money, buying too many tickets for these different affairs that were going on in the town; but I soon found out that was not the real purpose of the meeting.

Mr. Winne: I object to that, if your Honor please.

The Court: Objection sustained.

Q. Just state what actually happened.

A. What actually took place is that the meeting was [fol. 696-21] called to take the carrying of the money to Mr. Johnson away from me and place it in the hands of Jack Sothern.

The Court: Was Mr. Towbey to continue?

The Witness: No, he had nothing to say about the money.

The Court: It was taken away from him too?

The Witness: It was taken away from both of us.

The Court: According to this conversion.

The Witness: That is right.

Q. Now, you stated that there was a complaint about your buying too many tickets and giving away too much money to charities. In addition to handling this $1200 a week did you act as spokesman for the syndicate, or contact in connection with charities or tickets?

A. I took care of all the charities and all the tickets.

Q. That was all part of your job?

A. That was part of my job.

Q. And was all of that duty taken away from you?

A. Everything was taken away from me.

Q. And given to Jack Southern?

A. Give to Jack Southern.

Q. At this meeting when that was done were the other members, backers, present?

A. They were all present.

Q. Was there any agreement or vote on this change?

A. Mr. Rubenstein called for a vote on the change, and the vote was carried unanimously.

[fol. 696-22] Q. After that meeting when this was taken away from you, did you see the defendant Johnson?

A. I did.

Q. How soon after, as near as you can recall?

A. The following morning.

Q. And where did you see him?

A. Ritz-Carlton Hotel.

Q. Will you state to the jury your conversation with defendant Johnson at that time?

A. I went down to Mr. Johnson and told him just what had taken place.

Q. Now, you should state to the jury what you told him.

A. I told Mr. Johnson that there was a meeting held by the number backers whereby Jack Southern was told that he would handle the protection money from now on; it was taken away from me, and from now on they delegated Jack Southern to handle it; and I says to him if that is the way he wants it it didn't make any difference to me, never meant anything to me, just bringing it down here, if that is the way he wanted it, it was all right with me; and his answer to me was, "Well, what is the difference? Let him bring it down, that doesn't mean anything to you. Let him bring it down."

Q. Now, during this period of 1935 to 1937 when you were handling this money, did you handle political contributions?

A. We contributed to every campaign. I handled it.

Q. Now, can you state during these three years, 1935 to 1937, whether or not you had any conversations with the defendant about contributions to political campaigns?

A. Well, the usual procedure was that Mr. Johnson would tell me during the campaign, talk with the boys about a certain amount, the campaign fund, and I would go to the boys and ask for it. After a few days, why, I would get the money from Benny Rae, give it to Mr. Johnson.

[fol. 696-23] Q. How often did that happen during these years 1935 to 1937?

A. It happened during every election.

Q. Can you remember any amounts that you received from Benny Rae for political contributions?

A. Well, the usual amount was around fifteen hundred, fifteen hundred dollars.

Q. And to whom did you deliver the $1500?

A. To Mr. Johnson.

Mr. Burns: If the Court please, the next questions will go into a new subject matter and I would like to make an offer to the Court before questioning the witness.

The Court: Very well.

(At side bar.)

Mr. Burns: The reason I asked to come up to make an offer at side bar is that we have now come practically to the end of 1937, and I have no purpose in showing that with this witness the continuity of this arrangement beyond 1937, but in 1941, recently, there have been conversations between this witness and the defendant, and I will state in substance what one of them is so Mr. Winne will know whether or not he wants to object, and also whether or not the Court would rule one way or the other, because, as I say, it doesn't relate to the proof of the money itself but it relates to conversations with the defendant.

The Court: You mean in the nature of admissions?

Mr. Burns: Maybe not admissions. I don't know that I would call them admissions.

[fol. 696-24] The Court: All right, let us see what it is.

Mr. Burns: I expect the witness would testify that in

February of 1941 he was called to my office and talked to me, in Atlantic City, and then he went to see the defendant Johnson and he told the defendant Johnson that I had called him in and said that I was going to charge him, or the government was going to charge him with the tax on this $1200, as we could prove that he got it, and he would be taxed on a large sum of money, and if it turned out that he said he didn't get it, then he might be indicted for perjury, and he told that to Mr. Johnson. He told Mr. Johnson that he couldn't pay that tax, that he was out of business, and Johnson told him he was out of business too. As I recall the testimony that the witness gave me, it was that he told Johnson that the Mayor had put him out of business, and Johnson said, "Well, you put me out of business too."

I think that is admissible because it is related to this $1200.

Mr. Winne: I think it is admissible.

The Court: All right. You may proceed.

(In open court.)

. . . . . .

Q. In February of 1941, that is this year, did you see the defendant Johnson?

A. I did.

Q. And before you saw him had you been to my office in the Post Office Building in Atlantic City?

[fol. 696-25] A. I was.

Q. Will you keep your voice up?

A. I was.

Q. Now, as near as you can recall, where did you see Mr. Johnson?

A. Down to his home at the cottage, S. Iowa Avenue.

Q. As near as you can recall, will you state what you said to Mr. Johnson and what he said to you?

A. On that visit to Mr. Johnson I told him that I had been called in by Mr. Burns, I had been in to see Mr. Burns and Mr. Burns had explained to me these different counts that I had been indicted for, that he explained to me I was liable for fifteen years if I continued this perjury and I told Mr. Johnson——

Q. What did Mr. Johnson——

Mr. Winne: Let him finish.

A. (continuing) I told Mr. Johnson I was not feeling so good when I left Mr. Burns' office that day, that this thing had been going on for four or four and one-half years and I had been through all this trouble, and I stood two trials, went through two trials with this same thing, and I told him I could not stand it any longer and it appeared to me that it looked like I might wind up with this big tax bill of about $100,000 for money that I never received; that I had nothing to do with, I just merely brought it down here and I could not stand anything like this.

Q. What did Mr. Johnson say to that?

A. He said, "that is a lot of money, that is a lot of money."

Q. What else did you say?

A. I told him that I was willing to do most anything [fol. 696-26] for him, I was willing to make any sacrifice to help him, I was willing to go to jail for him if that would solve the situation, but I failed to see how that would, because I had already been indicted for lying about the matter and that there were other indictments pending against me, and I could not, I did not see how I could continue with this thing any longer. I was exhausted physically and financially, was out of work, out of business, and I just could not go any further with this perjury.

Q. What did you say to him about being out of business?

* * * * * * *

A. I told him I was out of business and Mr. Johnson answered me and said that he was out of business too.

* * * * * * *

Cross-examination.

By Mr. Winne:

* * * * * * *

Q. Now, I would like to call your attention to a photograph and ask you if you can identify yourself as part of that group?

A. Yes, I was on that trip.

Mr. Winne: May we have it marked for identification?

The Court: Yes, surely.

(Photograph marked D-5 for identification)

[fol. 696-27] Q. Does the photograph refresh your recollection as to when you were in Miami in 1936?

A. Yes, that is March 11, 1936.

Q. You say you first thought that you discontinued handling this money in the spring of 1936 and something happened that caused you to change your mind, is that right?

A. After talking to the men.

Q. Where did you talk to the men?

A. Well, at different places, at their homes.

Q. Didn't you talk to them in the jail at Woodbury?

A. I had one conversation with the men in Woodbury.

Q. In the jail?

A. In the Woodbury jail.

Q. And you asserted at that time that you didn't handle this money after the Spring of 1936, is that not correct?

A. At that time my conversation with those men, that was to the best of my recollection that I thought it was '36, the Spring of '36.

Q. And you swore to that before the grand jury in Camden in June of this year, did you not?

A. I don't recall that question being brought up in the grand jury.

Q. Were you not asked before the grand jury in Camden in June of this year what period of time you delivered money to Mr. Johnson and did you not reply from July or August of 1935 until March of 1936, or words to that effect?

A. I may have; I don't recall it.

Q. It was certainly your belief at that time, was it not?

A. At that time that was my best recollection at the time.

The Court: What time is this? You say June of this year.

[fol. 696-28] Mr. Winne: June of this year, last month; and those are the grand jury minutes which we would ask your Honor to treat with as you did the grand jury minutes of Mr. Corio.

The Court: Well, that was your view at that time as of last month; you mean that since that time you have checked up and concluded you were wrong?

The Witness: That is right.

* * * * * * *

Q. Where was the meeting at which you were supplanted by Southern?

A. In Southern's horse room, 623½ Atlantic Avenue.

Q. In addition to Southern having a horse room there, was there also a business conducted there by someone else?

A. Not to my knowledge.

Q. A telephone betting business?

A. Not to my knowledge.

Q. By Benny Rubenstein and his partner, Jack Malia?

A. Not to my knowledge.

Q. All right. In 1937 were you in Miami Beach, Florida?

A. I was.

Q. When?

A. About the same time.

Q. When did you go, to your best recollection?

A. Sometime in January.

Q. And how long did you stay?

A. A short time.

Q. Will you tell us what that is?

A. Down there for three weeks; came back for about ten days, and went back for about two more weeks.

[fol. 696-29] Q. You think in 1937 it was five weeks in all?

A. Approximately.

Q. Where did you stay in 1937?

A. At the same place.

Q. Did I ask you——

A. You asked me; 345 Collins Ave.

Q. Did I ask you where you stayed in 1936, was it the same place?

A. I don't recall that you did. I think you did.

Q. Did you own that building?

A. I did not.

Q. And your best recollection is now that you didn't have any contact with Mr. Johnson about money after sometime,—when,—October or November of 1937, was your testimony?

A. Conversation about what?

Q. No, not conversations; you stopped handling this money in 1937?

A. I stopped handling this money in about the latter part of 1937.

Q. You are certain that you didn't handle it after this meeting that was held at 623½ Atlantic Avenue?

A. Positive.

. . . . . .

Q. All right. So, as far as you know, there is no written proof that existed from the syndicate showing the time Southern took over and you quit?

A. There is no,—I don't know of any written proof of it.

Q. Can you suggest any document that might fix that date concerning which there is some uncertainty?

A. With reference to the record?

Q. Any record of any kind.

[fol. 696-30] A. The only record I have was the meeting where Southern took over. He wanted to take the money down to Mr. Johnson, he wanted to take it away from me.

Q. Before I forget it, would you tell me when you first started to handle any money with Mr. Johnson? Do you remember what you testified to?

A. Sometime in, it was the latter part of '33 or perhaps the early part of 1934.

Q. And at that time you were collecting from certain individual banks?

A. I never collected it. They brought it to the place. They brought it in and dropped it off. I never collected it. They dropped it off at this place, 1210 Arctic, and when they failed to do that we had a man that went out and picked it up.

Q. Were they the same banks that were operating in 1935, 1936 and 1937?

A. I believe they are the same banks.

Q. When and where was the first time you talked to Mr. Johnson about those payments?

A. Down at the cottage, on Iowa Avenue.

Q. What was that conversation?

A. I told him that these boys had been operating without paying, and they had several meetings, and they thought they would like to go along with this business without having any trouble with the police department, or any other troubles.

Q. Any troubles?

A. And keep out-of-town people, outsiders, out of the business. These were all local boys, home town boys, that were in the business. They wanted to keep outsiders out.

Q. Mr. Weloff, had there been any particular trouble at that time?

A. Not to my knowledge.

[fol. 696-31] Q. To your knowledge, had you or anybody been taking care of this matter in some other way prior to this time?

A. Not to my knowledge.

Q. You at the suggestion of these gentlemen sought out Mr. Johnson without any action on his part?

A. They come to the conclusion that they could pay this amount of money for this protection and asked me to go down and talk to Johnson about it.

Q. As far as you know, Mr. Johnson didn't in any way instigate this?

A. Not to my knowledge.

Q. That continued, generally, through the end of 1933, and through 1934 down to 1935?

A. That is right.

Q. The payments you described. And during that period you alone were the conveyor of this tribute?

A. I was.

Q. You had a lot of raids in the first part of 1935, didn't you?

A. I don't recall. There might have been.

Q. You didn't make any complaint that you recall about a great many raids in the first part of 1935?

A. I complained to the head of the Vice Squad about it.

Q. You didn't complain to Mr. Johnson about a great many raids in 1935?

A. It was not necessary.

Q. You didn't complain. Don't do anything, please, but answer the question.

A. I complained to the head of the Vice Squad.

Mr. Winne: May I have an answer, if the Court please?

The Witness: I didn't complain to Johnson about it.

Mr. Winne: Thank you.

[fol. 696-32] Q. Did you pay any other moneys during this period to Mr. Johnson besides the political contributions and other money you testified to?

A. I don't recall any other moneys.

Q. I am not sure whether I asked you directly or not, Mr. Weloff, but didn't you deduct from this $1200 certain moneys by an arrangement with Mr. Johnson for certain purposes that were agreed to between you, $190 each time?

A. I did not.

Q. And hand him $1010?

A. I did not.

Q. Mr. Johnson never attended any of these meetings in any of these rooms or anything of that sort, did he?

A. He did not.

Q. Or in any of these places where you wrote or had any of the number business?

A. He did not.

Q. Do you know when he ever, from your knowledge or anything he said, knew that there was any number business going on before you went there that time?

A. Before I went there?

Q. Before you went to see him that first time the end of 1933?

A. I believe he had knowledge that the business was going on.

* * * * * * *

Redirect examination.

By Mr. Burns:

Q. When you appeared before the Grand Jury in the summer of 1939, was that the first time that you had been questioned by the government about the numbers business? [fol. 696-33] A. That is the first time.

Q. And at that time you lied to the Grand Jury?

A. I did.

Q. At that time were you asked this question before the Grand Jury:

"Q. In 1935 you were appointed as the collector of the numbers syndicate, were you not?"

And did you answer, "No, that isn't so."

A. Yes, I lied about that.

Q. Well, now, why did you lie about it?

* * * * * * *

A. I didn't want to do anything or say anything that would hurt Mr. Johnson.

* * * * * * *

Recross-examination.

By Mr. Winne:

Q. That is the year you went down and stayed continuously?

A. That was in 1936.

Q. Just one question. The testimony you gave for which you were indicted, concerning which you just said you didn't help Mr. Johnson, you were on trial, you were accused yourself; were you not also helping yourself a little bit in that matter?

A. I was not thinking of myself. All the trouble I am in today is because I tried to protect Johnson. I was not thinking of myself.

Q. Mr. Weloff, please confine your answer to the question. [fol. 696-34] A. Yes.

Q. If there is anything counsel for the government wants to bring out he can.

Mr. Winne: That is all.

* * * * * * *

By the Court:

Q. I will read you some questions and answers, Mr. Weloff, and I will ask you whether you heard these questions and gave the answers to them which I shall read; whether you gave those when you were before the Grand Jury in Newark in August, 1939, I think that was probably the first time.

A. Yes, sir.

"Q. You know Nuck Johnson, don't you?
"A. I know Nuck, sure. Everybody knows Johnson.
"Q. Has he been in your cafe?
"A. Yes, he has been in my cafe.
"Q. Have you been up to his bungalow?
"A. No, sir."

Page 20, Mr. Burns.

"Q. Now, think about that. Have you been up to his bungalow?
"A. No, sir.
"Q. Have you ever been up to Nuck Johnson's bungalow?
"A. No, sir.
"Q. Never?
"A. Never.
[fols. 696-35–821] "Q. You are sure of that?
"A. Yes.
"Q. Have you ever been up to his apartment in the Ritz-Carlton?
"A. No, sir.

"Q. You are sure of that?

"A. Positive.

"Q. Now, Mr. Weloff, from July, 1935 until the beginning of 1937 you were seen either going to the bungalow, going to the Ritz-Carlton or meeting Nuck Johnson almost every Monday night. Now isn't that a fact?

"A. No, sir, that isn't true. That isn't true.

"Q. Didn't you meet Nuck Johnson every Monday night and give him the money that you had collected from the numbers business?

"A. Positively not. That isn't true."

Did you make those answers?

A. I did, sir.

Q. You now say they are not true?

A. They are not true, none of them, no sir.

The Court: Very well. For the reason that you have already explained, as I understand it?

The Witness: For the only reason that I didn't want to do anything or say anything that I thought would hurt Mr. Johnson. For no other reason.

* * * * * * *

[fol. 822] BENJAMIN RAVINSKY—RECALLED

* * * * * * *

Q. Well, after July 1 of 1935 were you the cashier of the syndicate?

A. I was.

Q. And how long did you remain cashier of the syndicate?

[fols. 823-828] A. It passed '37.

Q. Passed '37?

A. I think it was.

Q. How often was this $1200 paid out?

A. Every week.

Q. And to whom did you give the $1200?

A. That is clear to the end of '37?

Q. Yes.

A. I gave it to Weloff and Towhey up until late in October or beginning of November of 1937, I gave it to Weloff and Towhey.

Q. To whom did you give it after that?

A. Jack Southern.

* * * * * * *

[fol. 829] Cross-examination.

By Mr. Winne:

Q. What is your recollection when the meeting was at 623½ Atlantic Avenue, Mr. Ray?

A. In 1937.

Q. Had you previously had an opinion that it was in 1936 and changed after discussion with someone?

A. No, I did not.

Q. You thought all along it was 1937?

A. 1937.

Q. And I supposed you talked to the previous witness Weloff about it at the time he thought it was 1936?

A. I have.

Q. He said that he was in a conference or more than one conference with people and they talked it over. Were you at more than one of those conferences?

A. That came out, some thought 1936, Jack Southern thought that it was in 1937, October or November of 1937. I thought it was in 1937 myself.

Q. Who thought it was 1936?

A. I did not. But one or two men said they thought it was in 1936.

Q. Weloff thought so?

A. No, I am not mentioning Weloff thought so. I do not know who mentioned it.

Q. Who was there besides Southern and you at these [fols. 830-863] conferences?

A. Rubenstein, Southern, Towhey, Weloff, myself and Freidman.

. . . . . .

[fols. 865-867] Colloquy

Mr. Burns: I want to make the application now to call Martin Michael, have the Court call Martin Michael as the Court's witness. If there is any argument on it we might take it now while the jury takes a recess, if the Court wishes any statement as to my reasons, either the statement of counsel or under oath.

. . . . . .

[fol. 868-870] The Court: I propose any witness called by the Court will be examined by the Court. If I should call

one each party will cross examine him at such length as is desired.

I will first inquire from the defendant whether the defendant desires or proposes to sponsor this person as a witness for the defendant.

Mr. Winne: No, sir, I don't propose to sponsor him.

* * * * * * *

[fol. 871] (Short recess.)

The Court: Gentlemen: The government has requested the court to call Martin Michael as a witness on behalf of the court, or as the court's witness. After consideration of the matter, I have concluded that it would be in the interest of justice for the jury to hear the testimony which Martin Michael, or Jack Southern, is prepared to give. Without that testimony being binding on either party but simply to be considered by the jury for what it is worth.

In view of the fact that the testimony indicates that he was very closely associated in this matter, particularly in the latter part of the transaction the court will direct that Martin Michael be brought into the court room.

The jury will understand that this witness' testimony is not being offered by either the government or the defense because neither of them are prepared to sponsor his testimony. But I feel that you ought to have the benefit of what he has to say and consider it and determine what, if any, of it you should believe.

Martin Michael, called by the court and sworn as a witness, testified as follows:

By the Court:

Q. Mr. Michael, are you also known as Jack Southern? [fol. 872] A. Yes.

Mr. Winne: If your Honor please, because this practice is entirely new to me, I have never experienced it before, I would like to enter on the record an exception to the calling of Mr. Michael.

The Court: You may have an exception. I say again it is done solely in the interest of justice, in order that we may have in this case, the evidence of all persons whom

it clearly appears from all the testimony are in a position to give evidence bearing upon the issues here.

Defendant's counsel prays an exception which is hereby allowed and sealed accordingly. (Sealed.)

Q. Mr. Michael, were you in the numbers business in Atlantic City, in 1935, 1936 and 1937?

A. Yes.

Q. And were you during the latter part of 1935, 1936 and 1937 associated with a number of others?

A. Yes.

Q. Including Ralph Weloff and James Towhey in a syndicate of numbers banks who were working together?

A. A partnership, yes.

Q. During that period?

A. Yes.

[fol. 873] Q. Do you recall that during that period, or the earlier part of that period there was a weekly expense of $1200, which money was delivered either to Weloff or Towhey, and by them delivered to some other person?

A. I was never a witness to it being given to Weloff or Towhey.

Q. Did you know that was being deducted as an expense of the business during that time?

A. I know there was an amount. I do not know the exact amount.

Q. When was that? Do you know what day of the week that was done? Do you recall?

A. In those three years, your Honor, I was not very active in the business, I was not around much.

Q. Do you recall a meeting at which the question was brought up and discussed by yourself, and other persons, interested in that syndicate or partnership as to whether that particular payment should be handled in the future by Mr. Weloff or whether it should be handled by you. Do you recall such a meeting?

A. I do not quite understand the question.

Q. Do you recall a meeting of yourself and partners, the members of this syndicate, I think there were eight banks, were there not?

A. Yes.

[fol. 874] Q. The representatives of those eight numbers banks, did they have a meeting at sometime during these years at which the question was discussed as to whether

this particular expense to which I have referred should continue to be handled by Mr. Weloff or turned over to somebody else?

A. Yes.

Q. When was that?

A. Sometime the end of the summer or the fall of 1937.

Q. And you were there?

A. Yes.

Q. Was there a decision made at that meeting to change the handling of that money, to change the person who was to handle it?

A. Yes.

Q. What was the decision?

A. It was to be handled by me.

Q. Did you handle it from that time during the balance of the year 1937?

A. Yes.

Q. How much money was it while you handled it?

A. Well, it varied. $1200, I recall, was the amount.

Q. How often was that amount handled?

A. Well, I was supposed to get it weekly, but there was times I would miss and would get it the middle of the week or of the week, or get it in two payments.

[fol. 875] Q. From whom did you get the money?

A. Most of the time I got it from Benny Ray and some of the time I got it from Jim Towhey, with the understanding that Benny Ray give it to Jim Towhey to give it to me.

The Court: Can you all hear this witness? He is rather talking to me. I want to be sure you can all hear it. That is all right. They can all hear it.

Q. To whom did you pay this money each week?

A. The Inspector of Police, Ferretti.

Q. Is Mr. Ferretti here?

A. No, sir, he is dead. He has been dead about eight or nine months, or ten months.

Q. Where did you pay it to him?

A. In the City Hall, Atlantic City, in his home, in his saloon. He had a saloon. On the street I met him on several occasions.

Q. Did you ever pay any of it to the defendant in this case, Mr. Johnson?

A. I did not.

Q. What was the purpose of the payment while you made it?

A. My understanding of the purpose of it was not to be molested by the police.

[fol. 876] Q. Did you ever at any time have any dealings with Mr. Johnson about it?

A. About the money?

Q. Yes.

A. No, sir.

Q. Did you ever talk to him about it?

A. About the money?

Q. Yes.

A. No, sir.

Q. Do you know Mr. Johnson?

A. Yes, sir.

Q. Did you ever talk to him during that period—I am talking now about 1937?

A. About anything?

Q. Yes, about anything.

A. Yes, sir.

Q. About anything having to do with the numbers business?

A. Yes, sir.

Q. About anything having to do with the protection of the numbers business?

A. Not protection money.

Q. No, protection from police activity?

A. No, sir.

Q. You never did?

A. Not police activity, no, sir.

Q. Well, what did you discuss with him with regard to the numbers business?

[fol. 877] A. Well, the understanding that I had from the number busines is that we controlled the number business.

Q. No, I am asking you what was your conversation with Mr. Johnson with respect to the numbers business? What did you say to him and what did he say to you?

A. Well, I told him that I understood there was two other fellows, if I remember their names correctly, there was a fellow named Washington, and a fellow named Sheppard, who were breaking into the numbers business. I understood they had their backing by the colored political leader from the north side, Mr. Nutter; I wanted to know

if there was anything we could do about it. His answer to me was, "I will see."

Q. Was there anything that made you think that Mr. Johnson would be interested in protecting you from that competition?

A. Simply because it was a political matter, I knew Mr. Johnson, and I was sort of politically active.

Q. You thought it was a political matter?

A. No, sir; a political matter in my thought was that Mr. Nutter was taking care of these fellows and they were going in the numbers business and I thought he being was in poiitics I could get someone else to talk to him to [fol. 878] take these fellows out of the numbers business. We were the only ones supposed to be in the numbers business.

The Court: That is all the questions I have, gentlemen. Mr. Burns, you may cross-examine and Mr. Winne may cross-examine.

Cross-examination.

By Mr. Burns:

Q. Did you have any arrangement with the police about number slips when arrests were made?

A. Not the police.

Q. With whom?

A. Mr. Feretti. I don't know how to spell it.

Mr. Burns: F-e-r-r-e-t-t-i.

Q. Wasn't Mr. Ferretti inspector of police?

A. Yes, sir, I understood he was.

Q. And what was he in charge of?

A. Of the plainsclothesmen I understood he was.

Q. What arrangements did you have with him about the slips?

A. You mean the number slips?

Q. Yes.

A. The only arrangement I had with him about slips was when there was an arrest or a raid of some kind,—not a raid exactly, but when a number man was picked up that was the only arrangement I had with him.

[fol. 879] Q. What was the arrangement you had? What did you do?

A. Well, there used to be times there would be an arrest or a runner would get grabbed by the police with his slips and those slips were most important to the number office and I would get a call from somebody in the office. I very seldom was there, but somebody would contact me, I would immediately contact Mr. Ferretti and I would make arrangements to get those slips and replace other slips in place of those slips so that we could keep track of those played in case there was any complaints or anybody would say they hit, we would have the original slips.

Q. You gave Ferretti some old slips that were no longer needed in the business to be used as evidence in the place of the slips that were current and needed to pay the hits?

A. Yes, that is right.

Q. In 1937, at the time you took over this $1200, that was after the FBI raids, was it not?

A. Yes, sir.

Q. And were there quite a few arrests at that time?

A. To the best of my knowledge there was quite a bit of activity on the part of the police.

Q. Did you give the whole $1200 to Ferretti each week [fol. 880] when you were having all these arrests?

A. Oh, no, no.

Q. Well, tell the jury what you did when there were arrests?

A. Well, the usual procedure was when there were arrests, there would be what I understood to be a bail; that the writer or the pick-up man, whoever the arrest was made, would get out on that particular bail, whether it was $100, $200, I don't recall. I think originally it was $50, then raised to $100, then it got up to $200. That money would be put up, somebody would immediately get to the City Hall and put up whatever bail would be asked and I would keep track, they would let me know in the office how many arrests had been made that particular week that those arrests were made, and I would deduct the amount of that money from the original amount.

Q. Why did you deduct that from the original amount?

Mr. Winne: May I speak to your Honor a moment at side bar?

The Court: Yes.

(Colloquy between court and counsel at side bar.)

Mr. Winne: I just want to know, because I am not familiar with the practice, whether any inference is drawn [fol. 881] from any objection I make to the relevancy and competency of evidence.

The Court: Any inference—you should object to anything that is not competent or relevant, certainly, just the same as if it was a government witness.

Mr. Winne: I would think so.

The Court: The only difference is the government is not bound and may cross examine him.

Mr. Winne: I thought because your Honor called the witness that maybe your Honor would resent my objections.

The Court: Oh, no. I am not sponsoring this witness.

Mr. Winne: All right, your Honor. Thank you very much.

(Proceedings in the hearing of the Jury.)

The Court: I want to ask the witness a question before you direct any further questions.

By the Court:

Q. You say, Mr. Michael, that you gave this money to Inspector Ferretti?

A. That is true.

Q. You went to him the first week after this meeting [fol. 882] when you were designated to do it. How soon after that meeting did you go to him with the first weekly payment?

A. Well, to get an opportunity to explain that meeting, during this meeting the way I understood the meeting, what the meeting was for was it seemed to be that most of the fellows were dissatisfied with the expenses that Mr. Weloff was bringing in above this original money. It seemed to be——

Q. What sort of expenses?

A. Well, I understood it to be donations, charity donations and tickets and different things, and the fellows thought that Mr. Weloff was taking that opportunity to pay out our money in sums that would be twice as much as originally to be paid out, so as to take care of any other interests which he may have, he would get the benefit of that.

Q. They weren't satisfied?

A. That is true.

Q. And you were selected to handle that part of the business, you were selected to handle it?

A. Yes.

Q. And how soon after that did you receive the $1200 and pay it?

A. Well, the payment of the $1200, I don't know whether [fol. 883] the usual procedure for Mr. Weloff was to get on Saturday or Monday, I didn't know, I thought it was Monday; and this particular night of this meeting I don't recall what night of the week it was.

Q. It was within a week after that that you got the payment?

A. Sooner than a week.

Q. And what did you do with that first payment?

A. The following day—I had always did business with Mr. Ferretti, the complaints that I had about slips or anything else—the following day I received a phone call—this was during the height of this government investigation into income tax, and protection and raids. He called me into the Hall.

Q. Who did?

A. Mr. Ferretti.

Q. He called you in the day after the meeting?

A. No, it wasn't the day after exactly.

Q. I thought you said the following day.

Mr. Winne: After he got the money, your Honor.

A. (continuing) The meeting didn't break up until about three o'clock in the morning. He said to me, "I want to see you." I went down and he said—I don't know where he got the information from—he said, "I understand you are going to take care of the number money." I said, "I [fol. 884] understand the same thing." He said, "From now on you bring it to me."

Q. Well, then, he indicated that he hadn't had it before?

A. That is, he indicated——

Q. That is what you got from him that that was not first payment he had gotten?

A. He never got anything from me, no, he didn't indicate to me whether it was his first payment but I didn't know whether he took care of it before or after.

Q. You didn't?

A. No, I didn't know at that time he took care of it; I knew Ralph Weloff got it, but I had no knowledge of what Ralph Weloff was doing with it.

Q. You didn't?

A. No, I never went with him and never was a witness to him handing over any money.

Q. Was there any discussion at this meeting as to whom you were to pay the money to, not telling who it was, but was there any discussion at the meeting when you were designated, as to what your duty was to be?

A. No, I looked for that information to come from Mr. Weloff, but it didn't come that night.

Q. They didn't tell you who to take it to?

[fol. 885] A. I didn't get that information that night. I didn't get it the next day or for several days. The beginning of the week——

Q. When you got the money you had something to do with it——

A. I knew what to do with it after I got it.

Q. Did you talk to Weloff and ask what the procedure was that he had followed, a nothing of that sort?

A. No, sir. Weloff and we all went out of the meeting. It was held in my place. There was no conversation other than Benny Ray was told—There was an argument came up, Weloff said, "I am not going to stop handling it."

Q. What I am trying to get at, Mr. Michael, is whether your payment of this money to a police inspector was your own idea or whether it was something that you had discussed and some procedure that you were instructed to follow?

A. No, sir.

Q. Which was it?

A. It wasn't anything that I was instructed. They didn't instruct me who to give it to.

Q. What was it, just your own idea?

A. No, sir. I didn't get any money that night or the following night. I think it was two, three, four days before [fol. 885a] the payment was due but in between that time I got this phone call and I went to the City Hall.

[fol. 886] Q. And that, your visit to the City Hall, was the first that you had any idea of making a payment in that way or to that person, was it?

A. That is right, yes, sir.

Q. Well, did you make any effort in any way to find out whether he was correct in that, whether that was a proper payment to make or whether it was satisfactory to your partners?

A. Well——

Q. Did you just take it for granted it was all right?

A. The exact words were, when I came back, when I finally did get the money,—or I am going ahead of my story. When I spoke to Mr. Ferretti he said, "The heat is on. Things are pretty hot. I don't want you to ever mention I am handling this thing."

I went back, to the office the first time I got the money, I did go into the number office to get it, the first time I got the money. Other times it was brought to me by Mr. Towhey, if I wasn't around, or Mr. Ray would meet me outside the office and give it to me. When I went back I was questioned by the fellows if I had made the necessary contact to pay the money, because Weloff, he got very mad about having to get up, give up the handling of that money, and he said, "I am not giving it up until I am told to give it up." That was his exact words, and he was [fols. 887-897] answered, I don't remember by whom, but he was answered by somebody there, "Well, you won't get it so what are you going to do about it?"

In the meantime I got this call.

What happened in between the twenty-four hours I was not around these fellows I don't know.

The Court: I think I understand what you said.

Proceed, Mr. Burns.

Mr. Burns: I have no further questions.

Mr. Winne: We have no questions, if the Court please.

The Court: Very well.

Mr. Burns: Mr. Rubenstein.

Benjamin Rubenstein, called and sworn on behalf of the government, testified as follows:

Direct examination.

By Mr. Burns:

Q. Mr. Rubenstein, were you in the numbers business in Atlantic City?

A. Yes, sir.

Q. When did you first go in business?
A. As a pickup man?
Q. As anything.
A. 1928 or 1929. I worked for Austin Clark.

. . . . . .

[fol. 898] BENJAMIN RUBENSTEIN

. . . . . .

Q. During the years 1935, 1936 and 1937, did the syndicate make any contributions for political campaigns?
A. Yes.
Q. Can you state under what circumstances they made contributions?
A. We contributed to both parties, and Weloff and Tow-
[fol. 899] hey, whoever at that particular time was handling the money, would come in and say "There is a campaign on," and we just had to contribute. I mean they suggested we contribute and we would contribute.
Q. Was the amount you were to contribute suggested?
A. I do not believe it was. I believe whatever amount we contributed was our own idea.
Q. Do you remember any specific amounts that were contributed during any of those three years, 1935, 1936 and 1937?
A. Yes, one particular time I believe we contributed $1500 to the Republic party and $1000 to the Democrat.

. . . . . .

[fol. 900] Q. In 1936 you and Malia were through and Southern took the business over?
A. We sold our share.
Q. You stayed on in some other capacity?
A. Until about September that year.
Q. In September, '36 you got out of the place altogether?
[fol. 901] A. That's right.
Q. Now, wasn't the meeting they decided to turn the handling over to Southern held while you were still doing business in the place?
A. I don't believe so, Mr. Winne; I think it was '37.
Q. You think it was '37. Did you at one time express yourself to the contrary?
A. No, sir.

Q. You participated in some of these meetings in Woodbury when this matter was discussed with Towhey and Weloff?

A. Yes, sir.

Q. You are a resident of Woodbury?

A. Under the jurisdiction of Lewisburg.

Q. So all the meetings over there were at your domicile and you participated in them?

A. Yes, sir.

Q. Can you tell us which of the gentlemen who attended stated that they believed the meeting at 623½ Atlantic Avenue was in 1936?

A. Well, that entails an explanation.

Q. Well, give it to us.

A. Well, I was brought from Lewisburg June the 2nd and when I got to Woodbury I had a sort of reception committee awaiting me and there was an unofficial meeting held and at that meeting I was shown duplicate statements,—[fol. 902] duplicates of statements made by Towhey, Weloff and Ray to the agents. Everyone of those statements showed that they had said in those statements it was 1936.

Q. That is that the meeting at 623½ Atlantic Avenue was held in 1936?

A. That was in their statement, yes.

Q. At which time in the statement they said that Weloff and Towhey stopped handling the money and Southern began to handle the money?

A. That's right.

Q. All right. What followed the reading of those statements?

A. I told them I thought they were wrong.

Q. Were they there, Towhey, Weloff and Ray?

A. Yes.

Q. You told them you thought they were wrong?

A. Yes.

Q. Anybody else in the meeting?

A. Southern. You mean anyone there at the meeting or anyone else said it was wrong?

Q. I mean was anyone else at the meeting in Woodbury?

A. Yes, sir, Johnny Malia, Jack Southern, Joseph Friedman and Macrie was there but he was downstairs, he didn't come up.

Q. Of the others who were there beside yourself, Ray, [fol. 903] Towbey and Weloff, did the others express themselves about their belief concerning the statement?

A. About '37?

Q. About whether it was '36 or '37?

A. I only had the statement to go by. The statements were Weloff, Towbey and Ray. Those statements said—they showed me the statements and told me they were duplicates of statements made to the agents and they asked me if I thought that was the correct date. I disagreed with them. So did Southern emphatically.

Q. Now, Mr. Rubenstein, is there any way that you can help us in this inquiry to fix that date by any written record or document of any kind?

The Court: Which date?

Mr. Winne: The date when the change was made from Towbey and Weloff to Southern?

A. No written record, no, sir.

Q. Have you tried to think of any way by a lease or a sheet they might write on or something that would call your attention to the date?

A. Well, the only thing I have is a recollection it was after the F. B. I. raids in '37, I mean that is what I based my assumption on.

Q. Didn't somebody else say that first, that remark?

A. That remark?

Q. Yes, about the F. B. I. raids.

[fols. 904-928] A. Yes, sir. Southern said it.

Q. He said because he had made the statement to the agents that it was after the F. B. I. raids he thought he ought to stick to it?

A. That's right. He said he was afraid he would then be indicted for another count, perjury.

Q. So he stuck to it and you all stuck to it to help him out?

A. What's that, the '37?

Q. Yes.

A. No, my belief was it was '37.

* * * * * * *

[fols. 929-933] HERMAN DAVIDS.

* * * * * * *

Q. When you started to pay this $125 for the privilege of operating the day bank were you paying anything for operating the night bank?

A. No.

Q. Did you later start to pay for the privilege of operating the night bank?

A. The other banks complained about our operating the night bank, because it gave our pick-up men association with their day business, and once in a while one of them would steal one of the day writers from them and they kept complaining about it and finally we began to get a lot of raids on the night number only, not on the day, and I went to Weloff and Abrams. They were partners and they were handling the $125.

* * * * * * *

[fol. 934] Q. What happened after you talked to Weloff and Abrams about these arrests?

A. We agreed to pay $75 a week for the night numbers.

Q. For what?

Mr. Winne: Oh, I object to that. We have been all through that. He is not allowed to say for what.

[fols. 935-972] The Court: You paid $75. Then what happened?

The Witness: There weren't any more arrests.

* * * * * * *

[fol. 973] LEROY R. WILLIAMS:

Q. Did you have an expense of $1200 on these sheets?

A. We did.

Q. What date of the week did that appear?

A. Mondays.

Q. What was that for?

A. The privilege of operating.

Q. Do you know whether that was paid in one lump sum, or whether it was a lot of small items that added up to $1200?

A. The only thing I know the $1200 was put down as a losing item every week.

The Court: Always even money was it?

[fol. 974] The Witness: Yes.

Q. To whom did Benny Ray give the money?

A. Supposedly to Rafe Weloff or Jack Southern, or Jim Towhey. Of course, I never seen him give it to either one of them.

* * * * * * *

[fols. 975-995] Q. Did this numbers game also operate in 1938?

A. Yes.

Q. Did it operate in 1939?

A. Yes.

* * * * * * *

[fol. 996] WILLIAM SHEPPARD

* * * * * * *

Q. Did you every work for the defendant Johnson?

A. I did.

* * * * * * *

Q. What kind of work did you do at that time?

A. I was chauffeur and bodyguard.

Q. How long did you continue to work for him as chauffeur and bodyguard?

* * * * * * *

[fols. 997-1000] A. From 1934 until June 1937.

* * * * * * *

[fol. 1001] Q. Did you see any policemen or police officers come to visit Johnson?

A. All the time.

Q. Well, now, will you name some of them that you saw there?

* * * * * * *

[fol. 1002] A. Who did I see coming down there?

Q. Yes.

A. Ralph Gold, Captain Ferretti.

Q. Who was Ralph Gold?

A. He was a detective, Captain of the detectives. He wasn't captain of the detectives when he first started coming there.

Q. How often did you see him there?

A. Well, he came in regular.

The Court: What do you mean by regular, Mr. Sheppard?

The Witness: Sometimes he would be there every other night. Sometimes he would be there every night.

The Court: By regular you mean more than once a week?

[fol. 1003] The Witness: Yes, sir.

Q. What other policeman or police officers came there?

A. The Chief of Police, Director of Public Safety.

Q. What was the chief's name?

A. James McMenamin.

Q. How often was he there?

A. He would come there two or three times a week.

Q. What other policemen did you see there?

A. Jimmy Pike, Lash Groves.

The Court: Did you say,—I think I heard you but I am not sure,—did you mention a man named Ferretti?

The Witness: Captain Ferretti.

The Court: Captain Ferretti, he was the Captain of the Police Department?

The Witness: Captain of the detective department.

The Court: How frequently did he come there?

The Witness: Well, he was a detective first when I first went there and then he got to be made a captain or something and while he wanted to be made Captain he was there very near every day.

[fol. 1004] Q. Do you know when Ferretti became the Inspector in Charge?

A. No, sir, I cannot recall that offhand.

Q. But when he was coming there he was trying to be made a Captain?

A. Yes, sir.

. . . . . .

Q. Will you give some other names of policemen that you saw there?

. . . . . .

[fol. 1005] Q. Will you give the names of any others? You have mentioned McMenamin, Ferretti, Gold, Pike and Groves. Now, will you give any other names?

A. Well, in fact most every cop in Atlantic City visited Johnsen's home when I was there.

. . . . . .

[fol. 1005-a] JAMES F. TOWHEY, called and sworn on behalf of the government, testified as follows:

Direct examination.

By Mr. Burns:

Q. Mr. Towhey, were you in the numbers business in Atlantic City?

A. I was.

Q. Was there a time when you were in partnership with Ralph Weloff, Max Weloff and Dave Abrams?

A. Yes, there was.

Q. As near as you can recall state the year that partnership started?

A. I would say approximately 1932.

Q. How long did that continue, as near as you can recall?

A. Well, there was some disturbances we had amongst us and I could not say the exact date in 1935, but the month, I would say, around the first of May we dissolved partnership.

Q. And after you dissolved partnership with Weloff and Abrams, what did you do?

A. I had business before they were my partners and I just continued with that business and the men who worked with me before I took them with me.

Q. Did you take in a new partner?

A. Yes, Jack Southern.

Q. During the year 1932 up until the time you split with Weloff and Abrams in 1935, did your numbers bank pay anything for the privilege of operating?

A. Yes, they paid $125 a week.

Q. Do you recall about when they started to pay that?

[fol. 1005-1] A. Well, I would say sometime in 1933. I could not state that date as positive.

Q. At the beginning of 1935 are you sure whether or not they were paying it?

A. In 1935, yes.

Q. Do you know whether or not they paid this $125 a week up until at least the time of the split with the other partners?

A. Oh, yes, I kept the books.

Q. Did you have an employee named Isaac Nicholson in that Weloff, Towhey and Abrams bank?

A. Yes.

Q. Do you know whether he had anything to do with collecting money for this privilege from other banks?

A. He went to two or three banks and brought the money in.

Q. You stated that you were not sure of the exact date when you started to pay the $125, but do you remember what the $125 was paid for when you started to pay it?

A. For the privilege of running the number business unmolested.

Q. Do you know whether or not Ralph Weloff had anything to do with the collection of this money from other banks?

A. When?

Q. From the time it started until the summer of 1935, or until you split up in May?

A. Yes, as the money came in it was received by Mr. Weloff and he handled it.

Q. And if any of it was left with you or one of your other partners was that turned over to Weloff?

A. Nicholson often left it with me and I turned it over to Weloff.

Q. At the time you split up with Weloff, was there an [fol. 1005-2] argument or dispute between you and the other men about the business?

A. What other men?

Q. Weloff and Abrams?

A. Yes. There was some cases we had in court and they did not want to pay the expenses of it, and I knew I was responsible for it and undertook to pay the expenses and just decided I did not want to do business with them anymore.

Q. And then you went with Jack Southern?

A. And then I went with Jack Southern and his partner.

Q. How much of the number writing business that had belonged to your partnership of Williams, Abrams and Towbey did you take with you when you went with Jack Southern?

A. All of it.

Q. That left them without any stops or pick-up men?

A. None whatever.

Q. Do you know whether Weloff made any effort to settle the dispute between you and himself and his partner?

A. He at different times sent different people to me and

one time I received a phone call to come down and see Mr. Johnson about it.

Q. Did you go?

A. I did.

Q. Prior to that time had you known Mr. Johnson?

A. I had.

Q. Where did you go to see him?

A. At his cottage on Iowa Avenue.

Q. As near as you can recall in what month was that?

A. I would say about the middle of May, 1935.

Q. Now, as near as you can, will you tell the jury the conversation you had with Mr. Johnson?

[fol. 1005-3] A. At that time? Very brief; he wanted to know if Mr. Weloff and I could't get together and settle our differences and go on and do business, and I said no, I don't care to do business with him, and I left.

Q. That was the substance of the conversation?

A. Yes.

Q. What happened in the numbers business after you left Johnson and said you would not go back with Weloff?

A. Weloff decided to try to create a bank of his own and it wasn't very possible; it was possible but most everybody that would write numbers was already writing numbers and the only business he could get,—he couldn't create new business,—he tried to take stops or runners away from someone else, and he did.

Q. How did he do it?

A. By offering higher prices which created sort of a price war. Everybody raised their prices and the competition got very keen. It began to become a little noisy.

Q. And did that noise cause the police to start to take action?

A. There were a few arrests in that time.

Q. Well, now, what action was taken to end this price war and competition?

A. I don't understand what you mean, Mr. Burns.

Q. When did this competition end?

A. Well, it ended around the first of July, the last of, I would say the last week in June.

Q. And at that time did the different numbers backers have some meetings?

A. There was a few people and I think they were friends of Weloff, I don't know,—of course his brother was in an-

other bank, another brother, and I know it come to me it would be a good idea for everybody to agree on prices; [fol. 1005-4] in fact, it would be a good idea if everybody would join the business together.

Q. You heard that, did you?

A. I heard that and I was opposed to it.

Q. Well, now, when you were opposed to that suggested arrangement what did you do about it?

A. I first went down and asked Mr. Johnson about it, and he didn't seem to know much about it. I told him I was opposed to it, if he knew or had anything to do with it; he said he didn't, he didn't know anything about it, and my friends in the business, we got together and we talked the thing over, opposing the thing.

Q. Do you recall where that meeting was where you opposed the thing?

A. South Virginia Avenue, Atlantic City.

Q. Who were some of the men present?

A. Pete Macrie, he was one of the men who called the meeting; Benny Rubenstein, Leroy Williams, Dan Young.

Q. Well, what happened at that meeting, what was the result of that meeting?

A. It was really created in opposition to the syndicate thing, and we started talking over the possibilities of the thing, we started to like it ourselves.

Q. The net result was that instead of opposing it you decided it was a good idea?

A. Changed my mind; I thought it was a good idea.

Q. Then was there another meeting right after that?

A. The following day.

Q. Where was that held?

A. Fitzgerald Hall on North Kentucky Avenue.

Q. Now, will you tell us what happened at that meeting?

A. Well, every bank was represented at that meeting and we talked over the possibilities. Everybody was in there to protect themselves; they figured someone may have [fol. 1005-5] a scheme to take advantage of someone else so they were cautious in conversation but eventually they decided that they would all join together and create a syndicate and run the business that way.

Q. Now, was there any bank that was not represented at this Fitzgerald Hall meeting?

A. Dick Austin. I made a mistake when I said all the banks were there; in fact, Dick Austin, a fellow named

Sheppard and a fellow named Washington that was in the business, they were not there. There was seven banks represented at that meeting.

Q. Well, now, at that meeting was there any discussion as to whether the privilege to operate the syndicate could be obtained?

A. What do you mean, the privilege to operate the syndicate?

Q. Was there any discussion about whether this syndicate could operate? In other words, you had been paying for the privilege of operating independent banks; was there any discussion about paying for the privilege of operating the syndicate?

Mr. Winne: Yes or no, please.

The Court: Yes or no.

A. Yes and no.

The Court: He should explain that one, I think.

A. Well, no, we didn't talk about it, and yes, we were already paying, already contacted for paying.

Q. Will you tell us what you mean by that, that you had already contacted for paying?

[fol. 1005-6] A. We had been paying before.

Q. I see. The members who were represented there had been paying as individuals?

A. That's right.

Q. Was there any discussion at the meeting as to how that would be handled in the future?

A. Well, it comes back to the point where each one was trying to be protected there, as I stated before. Some friends of Weloff talked for the syndicate and friends of mine—Weloff and I were not friendly at the time—and friends of mine were against it. We went to this meeting, we were still trying to protect one another. Then regarding having a contact, friends of mine suggested that I would represent them.

Q. So it was suggested that there be two contact men instead of one?

A. That is right.

Q. Now, after you and Weloff were both named as contact men did you then do anything about this contact?

A. We went to see Mr. Johnson and explained to Mr. Johnson——

The Court: Who are we?

The Witness: Pardon me, Weloff and I,—we had then become friends.

A. (continuing:) We went to visit Mr. Johnson and explained to Mr. Johnson that we had agreed to have the syndicate, we thought it was a good way of running the business and keep things quiet, and in fact quieter than they had ever been, and the business would be under control, we would know everything that we were doing and everything that everybody else was doing, and he was pleased to hear it.

[fol. 1005-7] Q. Was anything said about the financial advantages of this organization?

A. Well, it seems there was a few weeks in May, say the last of May and first part of June, that these other banks—I couldn't say positive what banks—did not pay or did pay; after I left Weloff I know I did not. So we said that outside of Austin Clark who was not at the meeting, not in the syndicate,—we hadn't contacted him, we couldn't talk for him—but the seven, included Weloff and I, we could talk for; and instead of paying $125 a bank we would pay $150 a bank, which would give a total for the organization intact at that time of $1050.

Q. For what?

A. For protection.

The Court: I suppose weekly; as has been testified?

The Witness: Weekly, each week.

Q. Well, now, what did Johnson say about that? If you don't remember it is all right.

A. I couldn't say definitely his exact answer. He just didn't oppose it.

Q. Well, now, after that did the bankers have another meeting?

A. The following day we had a meeting and at that meeting we went into the details of running the business, appointed office managers and the way of running the business, and discussed the expenses of the business.

Q. And at that meeting did you discuss this expense of protection?

A. Yes, we discussed all expenses, including that.

Q. Now, we have been told that there were four men who ran the business, Leroy Williams, Benny Ray, Benny Ru-
[fol. 1005-8] benstein and yourself. Will you tell the jury what your job was?

A. My job was bookkeeper, secretary.

Q. Tell the jury just what sort of records you kept for this organization.

A. Made a daily sheet, a six-column sheet, with the date, the day, the day's number, on the top of the sheet, and the first column was, each column was lettered, and the first column was for business, the second column was for hits, the third column was for expense, the fourth column was for in, the fifth column was for out, the sixth column for remarks.

Q. Tell the jury what the ins and outs were.

A. If a bank brought in $500 worth of business and the hits were $400, the representative of that bank would receive a tape from an adding machine showing the $500 business, $400 hits and $100 in. That would be entered in the in column.

Q. If the hits were more than the collection, the difference would be recorded in the out column.

A. If the business was $500 and the hits $700, there would be $200 entered in the out column.

Q. What expenses did you list, what type of expenses did you list on these sheets?

A. All expenses, stationery, rent, office help, charities, the amount for protection, any salaries, donations, anything of that kind.

Q. All in the same column?

A. Yes.

Q. Now, since you kept the sheet, when did you put down on the sheet this item for protection?

A. I was not there every Monday, but every Monday I was there I put $1200 for protection on Monday's sheet.
[fol. 1005-9] Q. Now, how long did you continue to put the $1200 on the sheet on Mondays?

A. Well, until I left the business. Sometime after '38.

Q. Did you do it for the balance of 1935, six and seven?

A. The last six months of 1935 that we had the syndicate, the complete year of '36 and the complete year of '37.

Q. What was the total expense for protection for the syndicate for the year 1935?

A. The first day we started the syndicate was July the 2nd. We continued, well, we continued in the business till I left it. In 1935 we continued the last six months. It was paid every week. It figures about 26 weeks. Of course, the first two weeks after forming the syndicate the money amounted to $1050 a week, only seven banks. When the eighth bank came in it was $1200 a week, which continued until the last of 1935.

Q. What is the approximate total that was paid out?

Mr. Winne: Have you totaled it? Do you know what it is?

Mr. Burns: $30,900.

The Court: That is a matter of computation.

A. $31,200.

. . . . . .

Q. What was the total that was put on the sheet for protection for 1936?

A. $1200 a week.

Q. For every week?

[fol. 1005-10] A. Every week.

Q. A total of $62,400, is that right?

A. 52 weeks.

Q. And 1937, what was the total that was put on the sheet for protection?

A. $1200 a week, 52 weeks.

Q. That is again $62,400?

A. That is correct.

Q. Now, what arrangements did you have with Weloff for delivering that money to Johnson?

A. The first time Weloff and I went down together. After that we alternated. Sometimes I took a vacation or he took a vacation. A few times while he was away I took it down. A few times when I was away he took it down. That is, he asked me to take it down for him, and I know I took it then. I asked him to take it down for me. Of course, I didn't see what he did then.

Q. Did you ever receive any complaint that it hadn't come down during the weeks that you had been away?

A. No. There were a few times that while Ralph was away he deputized his brother Max to take care of it.

Q. Who gave you the money to take to Johnson?

A. Ben Ray was the cashier. He gave me the money.

Q. Where did you deliver it to Johnson during these years, 1935 to seven, inclusive?

A. A few times at 110 South Iowa Avenue, his cottage. Most of the time at the Ritz-Carlton Hotel.

Q. How did you hand it to him?

A. Put it in his hand.

Q. Was it in cash or in an envelope?

A. No, in cash.

Q. Now, did you keep these records, did you keep a [fol. 1005-11] record or make a statement each week of the net profit or loss of the syndicate?

A. I did, yes.

Q. Now, will you tell us for the year 1935, that half year, how much money, profit, was divided up among the partners?

. . . . . .

A. We started in July, the syndicate, in July of 1935, and the last six months of the year really, as far as business is concerned, it really shows two-thirds of the year's business. That is the biggest months in the year are July, August and September, and the business would be greater then than it would taking the first six months, and the profit we showed in the last six months of 1935 amounted to about $140,000. That was what was divided amongst the eight shares in the bank.

Q. That was after the payment of all expenses, including this figure of approximately $31,000?

A. That was profit received by the partners in the business.

Q. For the year 1936, will you state to us approximately how much net profit was split up?

. . . . . .

A. I can't remember the exact figure. It was somewheres over $200,000, two or two hundred twenty-five.

Q. And in 1937 what was the profit that was divided up amongst the partners?

. . . . . .

[fol. 1005-12] A. I would say it was less than 1936.

Q. About how much less? Give us the closest figure you can.

A. I would say less than two hundred thousand.

Q. Now, when did you stop carrying this money to Johnson, as near as you can recall?

A. Well, that was quite a discussion to try to establish that date we stopped. I originally thought, stated, made a statement and signed it, that I stopped giving the money to Mr. Johnson in the middle of 1936, but at the time I give the statement I wasn't sure, and my first recollection was brought about by conversation with Weloff. We were not sure when it was. I said it may have been four or forty times that I had gone there, but I couldn't state positive, and Jack Southern, he was in Woodbury Jail, sent for me, and I think I got your permission, Mr. Burns, to go see him, in a letter, and try to establish the date on the thing. I took Pete Macrie, who knew quite a few things about the dates on those things, and Benny Ray and Ralph Weloff, and we went to Woodbury, and at that same day Benny Rubenstein came in from Lewisburg and we went over different things to establish the date on the thing, and Southern said, "I think it was in November of 1937." I said, "Well, now, I have been to a lot of trouble with the government, but at the same time if I am telling the truth I am not going to say it is 1937 to hurt Mr. Johnson and help you. If it is 1936 I want it to be 1936, and if it is 1937 I want it to be 1937."

So everybody offered different things, reasons and dates and events that happened, and we arrived at November, 1937 without a doubt. Different things like the F. B. I. raid after Labor Day, or before Labor Day of 1937, talk of the world's series that year, who won it, who didn't; the different model cars they were driving. A few of the fellows [fol. 1005-13] had died in 1936, but after Southern really refreshed my memory on it, he said, "Do you remember 1937 when you wanted to get out of the business?" I said, "Yes." He said, "Do you remember then that was one of the reasons you wanted to stop going down there, and that you would like to let me take over your job," meaning Southern take my job. If you notice, there was no discussion about Southern taking the job away from me, it was taking the job away from Mr. Weloff. I willingly give the job to him because I was preparing to get out of the number business, and we established the date very well, and I am well satisfied on the date, the first of November, 1937.

Q. And that is your present best recollection?
A. Yes, I feel sure of that.
Q. What job was given to Southern?
A. Southern was to carry on where Weloff and I left off.

* * * * * * *

Q. Did you attend the meeting at which a vote was taken to give this job to Southern?
A. There was a meeting in Jack Southern's horse room, which has been talked about quite a lot. Rubenstein, Malia and Southern had a horse room, they were partners in this horse room and I was a partner of Southern's in the numbers business and Benny Ray was quite a friend of Jack Southern's and at different times we were often in there and talked in 1935, 1936 and 1937 and all different times, but at one time there was a meeting in there of all the number backers, Rubenstein called a meeting.

Mr. Winne: Your Honor, the answer would have been yes or no. We had a speech and I think that the witness should be responsive.
[fol. 1005-14] The Court: Listen to the question and answer directly as nearly as you can.

Q. Now, during these years 1935, 1936 and 1937, did the syndicate make any contributions for political campaigns?
A. Yes.
Q. Will you state what you know about those contributions?
A. I remember contributions a couple times of $1500.
Q. Did you have any duty to perform as bookkeeper whenever contributions were paid out?
A. I put the expense on the sheet.
Q. You wrote that on the sheet?
A. That is right.
Q. Now after you stopped taking this money to Mr. Johnson, did you see him at all during 1938, 1939 and 1940?
A. I saw him in 1940, the latter part of 1940.
Q. Did you see him in 1941, this year?
A. Yes.
Q. Where did you see him this year?
A. Oh, I met him at different places.
Q. Now, were you tried for perjury in this court this year?
A. I was.

Q. Did you see Mr. Johnson either before or after that trial?

A. Before and after.

Q. Where did you see him before the trial, as near as you can recall?

A. At the Ambassador.

Q. Will you state about what month that was?

A. I would say a month, approximately a month before the trial.

Q. And where in the Hotel Ambassador was this?

[fol. 1006-15] A. At the bar.

Q. What conversation did you have with him at that time?

A. Told him I was going to trial for perjury and a few remarks passed about it and I said I was being tried for perjury and did not expect to beat the case, and I was just going through the formality of the thing to keep from answering the questions of the syndicate and different things in the indictment that I was held for perjury on.

Q. You were convicted, were you not?

A. I was.

Q. After you were convicted did you see Johnson?

A. I did.

Q. Where and when?

A. Ambassador Hotel.

Q. Was anyone with you?

A. Ralph Weloff was with me.

Q. Now, as near as you can recall, will you state the conversation at that time?

A. I was waiting for a phone call from Jack Southern to make the appointment with Mr. Johnson. After waiting a couple of days, Mr. Southern disappeared, he come to court here and pleaded guilty so I didn't know exactly what he had in his mind. I explained that to Mr. Johnson. I said, "There should be a meeting or conversation about what is going on." The government seemed to be concerned mostly with Mr. Johnson's income tax. I explained to him that I had gone through the trial, the formality of the trial knowing that I couldn't do anything about it. Mr. Weloff was now going to trial and he was charged with three counts of perjury and he was liable for 15 years in jail. He also was liable on income tax evasion which carried five counts, five years to each count on that, that altogether the different men had been served out in this

court 39 years and they had 39 more years to serve out, [fol. 1005-16] I thought it was pretty near time something was done about it and the answer I received was not very responsive. Of course, there was a lot of side talk that I cannot remember but that was the subject we were talking about.

Q. There is one thing I want to go back to that I passed by. After Jack Southern started to handle this money, this $1200, do you know who delivered it to him from the syndicate?

A. Sometimes Benny Ray, sometimes I.

Q. Sometimes you did. That is all. Cross-examine.

* * * * * * *

Cross-examination.

By Mr. Winne:

* * * * * * *

Q. All right. Mr. Johnson said at the time you went to see him in the summer of 1935 that he knew nothing about the formation of this syndicate, is that right?

A. I said he didn't seem to know anything about it, that is right.

Q. That is what I understood you to say. And he received his information about it from you and Mr. Weloff?

A. I don't know if that was his first information. To my recollection, from what I knew, I said I don't think that he knew. I didn't think that he knew anything about it. He didn't tell me that he knew anything about it.

Q. You are testifying to your knowledge?

A. That is right.

[fol. 1005-17] Q. That he seemed to know nothing about it, and seemed to hear it for the first time from you and Weloff that day. That is correct, isn't it?

A. That is correct.

Q. And, in general, he said he would go along?

A. That is right.

Q. The proposal came from you gentlemen on behalf of the syndicate and he acquiesced in it?

A. What proposal?

Q. The proposal that you have a syndicate and club your resources and operate in the manner you have described,

and that you and Weloff would bring down $1200 each week alternately to him?

A. That is right, at the rate of $150 a bank.

By the Court:

Q. Was there any discussion at that time as to what you would get for that, or what he would do or anything of that sort?

A. We were giving, given the privilege to run and we did run unmolested.

Q. That was discussed, was it, at that time? I am asking you whether there was any discussion between you and Johnson at this first meeting.

A. That we could run.

Q. With regard to what the money was for or what he would do or what you would do in the future, or anything of that sort, with regard to your relationship?

A. I said we were able to pay $150 a bank, and that we would pay that, and we would run and not be bothered; we were stopping all this noise that was going on in the town, and it was agreed all around.

[fol. 1005-18] By Mr. Winne:

Q. There was nothing specific said about what use would be made of the $1200, Mr. Towhey?

A. No.

Q. It was understood that whatever means had to be adopted to accomplish the purpose would be compensated for by that payment?

A. My work ended there.

The Court: Was there any such understanding as Mr. Winne has now described in his question or not?

Mr. Winne: What did he say?

The Court: Let us have the question read over, Mr. Winne's question.

(Question read.)

The Witness: I don't understand the question, Mr. Winne.

Q. Any means that had to be adopted to accomplish the purpose of permitting you to run unmolested, those means would be accomplished by the use of the $1200 a week?

A. We didn't talk of the use of the $1200 a week.

The Court: Was there any discussion that Mr. Johnson was to make any payments out of this $1200 for any purpose?

The Witness: No.

[fol. 1005-19] The Court: Was there any understanding that he was to make any payments out of it for any purpose?

The Witness: Not with me.

Q. The understanding was that you were to be permitted, as far as possible, to run without any hindrance?

A. That is right.

Q. And for that there would be this weekly payment to accomplish that purpose?

A. I do not understand the meaning of the question.

Q. You paid $1200 to accomplish the purpose of running without interruption, didn't you?

A. That is right.

Q. And you left it to Mr. Johnson to decide how that was to be accomplished?

A. That is right.

Q. As far as you were concerned you did not care whether you gave it to the Democratic, Republican or Socialist Party as long as you get results?

A. It was none of my business.

The Court: In other words, then do I gather, Mr. Towhey, the situation was that you looked to Johnson to produce whatever result you had in mind.

The Witness: I did.

Q. And you did that because he was the acknowledged leader of the party in control in Atlantic City and Atlantic County, is not that right?

A. That is right.

Q. And he had been for a long while, and I suppose to [fol. 1005-20] the extent you were in politics you recognized that and worked with him as your leader?

A. That is right.

Q. And the details of how he accomplished his purposes were not for you to inquire about at all?

A. No.

Q. And all you wanted were, as some other witnesses said, the results, and the means you left to him?

A. That is right.

Q. I want to ask you if you came to a determination at the jail in Woodbury which changed the opinion you had stated in writing that the meeting at 623½ Atlantic Avenue was in 1936?

A. I did not state in writing that the meeting at 623½ Atlantic Avenue was at any time. It was not in the statement.

Q. I understood written statements had been given by you and Weloff to the government; that these statements were shown to Southern in the jail and that those statements said that the meeting had been held at 623½ Atlantic Avenue in 1936. Was that not correct?

A. The thing I remember about the statement was, which I said just awhile ago, that we took money to Mr. Johnson from the beginning of July, 1935, until March of 1936. I do not remember exactly stating a date as to that meeting.

Q. I am sorry. I am not trying to confuse you. I get my information from witnesses like you and I understood Mr. Weloff to say that a written statement was given to the government fixing the time Southern took over as the spring of 1936. Now, is that right?

A. The thing that comes in there—took and meeting. It seems to be one thing.

Q. I thought it was. I thought there was a meeting at [fols. 1005-21–1112] which a vote was taken and Southern took over and you and Weloff were out.

A. At the time of the meeting was the time Weloff and I stopped and Southern started.

Q. And that you said in this written statement was in the Spring of 1936.

A. Do you say I in that written statement said in the spring of 1936?

Q. I just want to understand you. I do not want to confuse you at all.

A. No, I am not confused.

Q. There was a written statement then and it was shown to Southern and there was a discussion and that was the date Benny Rosenberg came back to Woodbury?

A. Benny Rubenstein came back.

Mr. Winne: Excuse me. I mean Benny Rubenstein.

Q. I ask you if at that meeting at the jail in Woodbury you came to a different conclusion than that expressed in the written statement?

A. Not completely had I arrived at another conclusion.

Q. I ask you if you had did not on the following day swear before the grand jury at Camden that it was in the year 1936?

A. I left that open in my statement in the grand jury at that time in Camden. Before the Camden grand jury I still said I was not positive of the date. That I would make positive so that I would not hurt or help anybody or hurt myself.

* * * * * * *

[fol. 1113] COLLOQUY

Mr. Winne: If your Honor please, I have first a motion to strike from the record all reference to income or receipts or disbursements by the syndicate, or anything of that sort, after the first day of November, 1937. There is some testimony of that kind, and I am not prepared at the moment to point it out in detail, but such testimony I think your Honor has ruled is not admissible in this case as not having been connected up with the defendant after that date.

Mr. Burns: We oppose that. We do not think that the Court should take any one witness' testimony as to what he said and make a ruling on that as to the exclusion of other evidence. The other evidence is admissible and at the conclusion of the whole case the Court can then rule if it is in any way clear which testimony shall go out. But at this stage of the case we have established that protec-[fol. 1114] tion was being sold to this numbers game from 1933 past 1937 and the only one that there was ever any dealings with as to what the protection would be, was Johnson. We are told that he had ample power to render this service and that he would render it, and it just happens that for the last couple of months of the period, one witness, who was not vouched for by the Government, says that he gave it to a dead man. Under all these circumstances it having been shown that this man, now dead, having been a very frequent visitor to Johnson's home, and there being no testimony from anybody that there was any arrangement with this dead man to give any protection, merely that Southern gave the money to him, the jury has a right to infer, even if the testimony of Jack Southern is a fact that it was received from Southern for Johnson.

The Court: I think the motion is premature. It strikes me that the motion should be made at the close of the case. It is just possible that evidence produced by the defense [fol. 1115] on cross-examination of some defense witness might establish the relevancy of the testimony.

Mr. Winne: It seems to me that the burden being on the Government and the Government having failed to establish, as shown by the questions to the last witness Doxon, that income for those last two months was received by the defendant, having abandoned, under your Honor's ruling, the claim that in those last two months the defendant received any income from this source, I do not see how in any stage of the proceedings, that being the status of the matter at the conclusion of the Government's case, that he can be charged in 1937 with any more than the witness testified was income on which a tax should be paid.

The Court: I will with-old ruling on that motion until the conclusion of the case.

* * * * * * *

[fol. 1115a] Enoch L. Johnson, called and sworn in his own behalf, testified as follows:

Direct examination.

By Mr. Winne:

Q. Mr. Johnson, you are the defendant in this case?
A. I am.
Q. Where do you live?
A. 110 South Iowa Avenue, Atlantic City.
Q. How old are you?
A. Fifty-eight and one-half.
Q. Where were you born, Mr. Johnson?
A. Galloway Township, Atlantic County.
Q. Where were your early educational days?
A. High school graduate in Mays Landing.

* * * * * * *

Q. After you were elected Sheriff what position did you hold, if you remember?
A. Elected County Treasurer of Atlantic County.

Q. Elected by whom, Mr. Johnson?
A. Board of Chosen Freeholders.

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A. Yes, sir.
Q. At any rate, you still are County Treasurer?
A. Yes, sir.
Q. You have been during all this period of time?
A. Twenty-nine years, I think.

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[fol. 1115-1] Q. When did you begin to be active in politics?
A. Thirty-five years ago.
Q. Have you been in politics ever since?
A. Yes, sir.
Q. Have you any other business or profession or occupation except politics?

Mr. Burns: If the Court please, we haven't yet established that politics is a business or profession. No use talking about any other business or profession.

The Court: He says he was County Treasurer and he was paid a salary. That is a business certainly.

Q. How much of your time have you devoted to politics in the last thirty years, Mr. Johnson?
A. Nearly all of it.
Q. And is your position as County Treasurer, the result of your being in politics?
A. Yes, sir.
Q. What can you say as to the position you have occupied through the years in question in this indictment, 1935, '36 and '37 in politics in Atlantic County, Mr. Johnson, forgetting your modesty for a moment?
A. I don't understand the question.
Q. Well, did you become the acknowledged leader of the Party in the County for those years and in the City?
A. 1935, '36 and '37?
Q. Yes, sir.
A. I think so.
Q. And for some time previous thereto?
A. I think so.

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[fol. 1115-2] Q. Did you sometimes have any members of the Atlantic City police force at the bungalow, Mr. Johnson?

A. Yes, a lot of them have been there.

Q. For what purpose?

A. Socially, politically.

Q. Did you ever on any occasion discuss with any member of any law enforcing body anywhere, any time, the performance or failure of performance of their duty?

Well, I will withdraw the question. It is a little broad.

During the period in question covered by this indictment, did you ever attempt to influence any officer of the Atlantic City police force in relation to his duty?

A. No, sir.

Q. Did you ever at any time in your life spend any money for the purpose of having any police officer fail to do his duty?

A. No, sir.

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Q. Did you keep a big tin box in a closet that contained money and papers in your apartment?

A. I have a box in there that contains some legal papers.

Q. Did you keep money in that box?

A. Not necessarily.

Q. Did you have any place where customarily you kept substantial sums of cash?

A. A safe-deposit box in the Ritz.

Q. You mean the Ritz-Carlton Hotel?

A. The Ritz-Carlton Hotel in Atlantic City.

Q. Did you at any time have a safe-deposit box at the Ambassador Hotel in New York City?

A. A short time.

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[fol. 1115-3] Q. I want to direct your attention to the Weloff and Towhey testimony, Mr. Johnson. Did Mr. Weloff, some time in the first part of 1935, state to you that he was paying you certain sums of money for the privilege of operating?

A. Not for the privilege of operating.

Q. Did Mr. Weloff, in the early part of 1935, tell you the story about Towhey taking his busines away and asking you to help him get the business back?

A. No, sir.

Q. Did Weloff tell you at some time of Southern succeeding him as a conveyor of this money, and did you say, "Well, what is the difference, let him bring it down," or words to that effect?

A. I did not.

Q. What about the campaign contributions from Weloff in the period 1935, 1936 and down to the first of November, 1937. What is your recollection about that?

A. I think he gave some during the three years.

Q. Could you tell us how much they were, as near as you can recall?

A. I think they were $1500 a year; I am not sure.

Q. Well, whatever was given, was given to you, Mr. Johnson?

A. Yes.

Q. What did you do with it?

Q. Spent it for campaign purposes.

Q. Was any part of that included in the disbursements that you took credit for in those taxable years 1935, 1936 and 1937?

A. No, sir.

Q. You neither charged yourself nor credited yourself with that money?

A. That is right.

* * * * * * *

[fol. 1115-4] Q. All right. Will you tell us, Mr. Johnson, as nearly as you can what was said by Weloff and Towhey at the time the syndicate was formed when the arrangement was first made with you concerning the receipt of $1200 weekly?

A. Weloff came to me and said they had formed a syndicate and he was going to bring twelve hundred a week after that.

Q. Yes, sir, and what further did he say about that money?

A. And he said they increased it because they knew I had increased expenses, or it was being increased and I had increased expenses in the maintenance of the organization and advancement of my own leadership, and that is about all.

Q. Previous to that Weloff had been making payment to you over some period of time?

A. Some time in '35, the early part.

Q. In the early part of 1935?

A. Yes.

Q. And did you ever have any discussion with him about what use you would make of the funds he gave you?

A. Not particularly except that he told me on several occasions that he wanted to help me win my elections and carry on as a leader because he knew I was friendly with Weloff.

Q. Was the term protection or privilegs ever used in any conversation between you and Weloff in relation to this matter?

A. Not that I remember.

Q. Did you purport to give Weloff and his syndicate protection?

A. No, sir.

[fol. 1115-5]Q. Did you purport to give them the privilege of operating, Mr. Johnson?

A. No, sir.

Q. What did you purport to do for this money?

A. Elect candidates that were friendly to my policies and to carry on throughout the year, build up the organization, taking care of the poor and paying rents, buying coal, fuel.

Q. Did that require money, Mr. Johnson?

A. Yes, sir.

Q. And were your policies known to Mr. Weloff and Mr. Towhey?

A. Yes, sir.

Q. Were they known generally to the people of your County and City?

A. Yes, sir.

Q. What were your policies?

A. I was in favor of a lot of amusements for the people, in favor of numbers.

Q. Now, I want to call attention to the income you reported in the year 1935. You don't report your salary as County Treasurer because that is tax exempt, is that right?

A. I think it was at that time.

Q. Yes, sir. I think we all agree to that.

How do you become entitled to that salary as County Treasurer, Mr. Johnson?

. . . . . .

A. Because I had political strength and influence.

Q. What is this income, "Mays Landing Record $7500"?

A. It is a weekly newspaper; I am president of the company.

[fol. 1115-6] Q. And does any substantial part of their income come from politics?

A. Practically all of it.

Q. In what manner?

A. Through Sheriff's sales, Surrogate's notices, tax sales.

Q. And have you any ability and influence in that kind of business?

A. I shouldn't say I influenced it.

Q. You would not?

A. It is natural.

Q. What is natural? Explain your answer.

A. Well, elect a Sheriff and Surrogate, and they naturally give their business to the paper which is supporting me.

Q. What is this item of $2716, the American Oil Company?

A. Sales, commissions, a certain percentage per gallon.

Q. Do you help that company sell their products in this vicinity?

A. Make contracts with different concerns.

Q. Well, I don't know, Mr. Johnson, and I don't want to suggest it if it isn't so, but what is the nature of the people that contract with it; are they political or otheriwse?

Mr. Burns: You may suggest that.

A. Mostly political.

Q. Then, the item you reported as commissions; will you state what that is?

A. That was commissions after my expenditures politically that remained from the numbers money.

Q. And did you receive that because of your political activity, sir?

[fol. 1115-7] A. I think so.

Q. Now, the other items are insignificant, so I will ask you if your entire income in the year 1935 was not attributable to political activity of yourself?

A. I think all three years—pardon me.

Q. Well, I will take the others later.

A. Yes, sir.

Q. Now, referring you to the year 1936, you had the same situation in regard to your salary; it was tax-exempt; is that correct?

A. Yes, sir.

Q. And you reported a different item for Mays Landing Record, but the situation, I take it, was the same; you still were an officer of that publishing company?

A. The Sheriff was friendly and the Surrogate.

Q. The American Oil Company $1749; that was the same as you testified about 1935?

A. Yes, sir.

Q. What was the item for commissions $30,000 some odd dollars?

A. That was the remaining money from the numbers which I apropriated to my own use and spent the difference carrying on the political organization of which I was the head.

Q. I am afraid I read '37 ahead of '36; the last questions were attributable to '37 and I ask you what the item for commissions was, twenty-six thousand some odd dollars in 1936?

A. That was the money remaining from the numbers which I appropriated to my own use after the political expenditures.

Q. And what can you say in relation to the tax you paid for those years upon the money which you say you appropriated to your own use?

[fol. 1115-8] A. I paid taxes on everything that I had the benefit of personally.

Q. Now, what happened to the difference between 45,700, in 1935 or some such figure as proven by the Government as numbers receipts and the figure reported by you as commissions, $23,246.59? What became of the difference?

A. I spent it to carry on the political organization.

Q. All right. I won't go into the detail, Mr. Johnson on '35. but in '36 the difference between $50,400, which I think is the Government's proof, and your item of commissions——

Mr. Burns: $62,400.

Q. Oh, $62,400, I beg your pardon, in '36, and your item of $26,441.08?

A. I spent it to carry on the political work of the organization which I headed.

Q. Can you tell us now what those expenses were in the year 1936, approximately?

A. May I read from a memorandum?

Q. Have you a memorandum that will refresh your recollection, Mr. Johnson?

A. I have.

Mr. Burns: I would like to see it before he refers to it.

The Court: Certainly. Mr. Burns may see it.

Mr. Burns: May I ask a few questions?

The Court: Certainly.

By Mr. Burns:

Q. When was this made, this memorandum?

A. This morning.

[fol. 1115-9] Mr. Burns: I object to it.

By Mr. Winne:

Q. Go as far as you can without the memorandum, Mr. Johnson; what disbursements did you have in 1936 from this money which the Government labels numbers?

A. About $5,000 paid to the Atlantic City News.

Q. Who was the gentleman identified with that paper?

A. Mr. Herman.

Q. And what other paper?

A. And about seventeen or eighteen thousand dollars paid through my office to different workers throughout the year and around election time.

Q. And were there any other disbursements out of this money?

A. And about ninety-seven hundred dollars to the Atlantic City World for publicity.

Q. Who was the gentleman identified with that paper?

A. Mr. Friedberg.

Q. Were there other disbursements in 1936, Mr. Johnson?

A. Twenty-five hundred dollars to a Mr. Jeffers for political purposes, carrying on meetings; Walter Jeffers.

Q. Was that substantially the use to which the balance of this numbers money was put by you, Mr. Johnson?

A. I think there was another item in 1936 of $2,080, paid to the independent or the—some arrangement where some one was paid $40 a week.

Q. Do you know who got the $40?

A. Mr. Ogilvie, I think.

Q. Of this money?

A. Yes.

[fol. 1115-10] Q. Referring to the Herman expenditure. That was to a person who owned and conducted a newspaper?

A. Yes, a weekly newspaper.

Q. What was that money paid for?

A. To create goodwill for myself as leader in the Republican Party.

Q. How did you make those payments?

A. Sometimes weekly, or every other week. Different periods throughout the year.

Q. And that came from the receipts you got from Weloff and Towhey?

A. Yes.

Mr. Burns: If your Honor please, I object to those leading questions. Which money? It might have been American Oil money or the County Treasurer's money.

Mr. Winne: I think Mr. Burns is correct.

The Court: You are leading the witness right along.

Q. From what source did the moneys come you paid Mr. Herman's newspaper?

A. From the numbers money.

Q. What was your arrangement with Friedberg?

A. He was to create a goodwill and publish favorable news and editorials.

Q. From what source did the money come that Friedberg was paid?

A. From money left by Weloff and Towhey.

Q. And the Ogilvie item; explain that, please.

A. That was paid by the money left by Towhey and Weloff.

. . . . . .

[fol. 1115-11] Q. Will you describe where the money came from that you say was disbursed at your office in the Guarantee Trust Company?

A. From the moneys left by Mr. Weloff and Mr. Towhey.

Q. Will you tell us what method was used in distributing that money and to whom, and tell the Judge and jury about it.

A. Different people who wanted help, either came to the

office or down to see me, and I sent them to the office and sent the money up to pay them.

Q. What do you mean by the office?

A. My office in the Guarantee Trust Building.

Q. And to whom would you send the money you referred to?

A. Most of it to Mr. James Boyd.

Q. Any of it to anyone else, Mr. Johnson?

A. I think Mr. Chase handled some of it.

Q. What was your practice in communicating between your home and your office?

A. Sent it up by the messenger from the office with the mail at different periods.

Q. You see we don't know about that messenger. Tell us about that messenger from the office.

A. He came to the apartment every morning for the mail.

Q. That is to say, he came from the Guarantee Trust Company office to your apartment each morning with the mail?

A. Yes.

Q. What would he do after that?

A. Take the mail up to the office.

Q. You mean he would wait at your home?

A. It was usually ready for him.

Q. I didn't get the answer.

[fol. 1115-12] A. It was generally ready for him.

Q. The mail was usually ready for him?

A. Yes.

Q. Did he deliver mail to you in the morning?

A. Sometimes.

Q. What was your practice in regard to that mail?

A. That would go up the next afternoon.

Q. You would hold it over from the afternoon before. The mail from the afternoon before would be ready for him, is that right?

A. Usually.

Q. Would you see that messenger or some other messenger again that day?

A. Not necessarily.

Q. Not usually until the next day, is that right?

A. No.

Q. Just once a day?

A. Yes, sir.

Q. Who would you use to transport money from the home to the office for the purpose you have just stated?

A. Usually Mr. Chase.

Q. Was Mr. Chase sometimes that messenger that you have just described?

A. Yes, sir, he was connected with my office.

Q. How would you know what money was wanted down at the Guarantee Trust Company office for the purpose you related?

A. They would call me on the phone or I had a memorandum of those whom I sent in there.

Q. Who would call you on the phone?

A. Usually Mr. Boyd.

Q. And who would send a memorandum?

A. I would.

[fol. 1115-13] Q. That is to say, if the request came from the office it would be a phone call as a rule from Mr. Boyd?

A. Yes, sir.

Q. And if the petitioner accosted you directly you then would send a memorandum to Mr. Boyd, is that right?

A. Yes, sir, with the money.

Q. With the money. What form would that memorandum be in, usually?

A. Bill Smith wants to do a little canvassing.

Mr. Winne: May I have the answer?

(Answer read.)

A. (continuing) And I would approve of it.

Q. Was it always canvassing?

A. No, no, but I just mentioned a particular case.

Q. You used that as an illustration?

A. Yes.

Q. Will you tell the Judge and jury the character of the services that were rendered for the moneys that were paid out in that way or for what purpose the moneys were paid out?

A. Used it for canvassing and clerk hire, rents, carrying on precinct meetings, dinners, promotional events.

Q. In whose behalf?

A. On behalf of myself as leader and in the interests of the Republican Party.

Q. Were receipts taken, if you know, for such moneys as were disbursed?

A. They usually had receipts.

Q. And were you informed as moneys were used up and more moneys needed, Mr. Johnson?

A. Yes, sir.

[fol. 1115-14] Q. In what amounts would moneys be advanced by you to Mr. Boyd or Mr. Chase?

A. Well, around election time it became much heavier than during the early part of the year.

Q. We don't know, Mr. Johnson, just tell the Judge and jury the amounts.

A. Well, I don't remember particularly, three hundred, five hundred, sometimes a thousand.

Q. Now, referring to the third count of the indictment down to approximately November 1, 1937 from what source did the moneys, "other commissions," come?

A. Money left by Mr. Weloff and Towhey after paying the expenses of running my organization.

Q. Referring to 1937, from January 1st down to about the first of November, what moneys did you spend out of the moneys received from Weloff and Towhey in 1937?

A. About $5,000 to Mr. Herman and over $10,000 to Mr. Friedberg of the Atlantic City News or Atlantic City World, and I think around $6,000 to the office for political workers, activity in my interests.

Q. And was that money through the office disbursed in about the same manner in 1937 as it was in '36?

A. Yes, for workers and canvassers and meetings and precinct——

Q. And the machinery was about the same, sending it down to Boyd and taking receipts and so forth?

A. Yes, it operated that way, in order to carry on we did these things.

Q. Now, do you recall the manner in which you compiled your return or had it compiled for you in those three years, Mr. Johnson?

A. You mean income tax returns?

Q. That's right, yes.

[fol. 1115-15] A. Yes, sir.

Q. Was it the same manner in each of the three years or did it differ?

A. About the same.

Q. Will you state to the Court and jury what your method was in finding out how much tax you owed the government, and paying it?

A. I had a meeting with Miss Paxson and Mr. Bewley and someone representing Judge Jeffers and I would take their accounts and put them down with the deductions and the moneys I received from Weloff and Towbey, after deducting the newspaper expense and the expense of running the political machine or, term it that, or carrying on in the interests of the Republican Party of which I was the leader. I would deduct that from the money left by Mr. Towbey and Mr. Weloff and include that as commissions.

Q. Who originated the term "commissions", if you know?

A. I don't remember. I probably did.

Q. How can you tell what amount was left; did you keep records of it?

A. Kept memorandums of moneys I received and moneys that I spent under these different arrangements I had.

Q. Well, what did you do with those memorandums?

A. I sent them up to the office at different periods to keep until we met and made up the income tax.

Q. By the office, what do you mean, Mr. Johnson?

A. Up to my office in the Guarantee Trust.

Q. To whom?

A. Miss Paxson usually. I sent them to Miss Paxson.

Q. Now, what form did the communications between you and Miss Paxson take?

A. Just a memorandum. I would put it in and address it [fol. 1115-16] to her... It would be "$1700 income", maybe something else.

Q. Well, I want to be sure that not only you and I understand, Mr. Johnson, when you say memorandum you mean a writing on a piece of paper?

A. Yes.

Q. Would it be enclosed in any kind of enclosure?

A. In an envelope.

Q. And to whom would that envelope be addressed?

A. Miss Paxson.

Q. All right. Miss Paxson received an envelope and opened it and what did she find inside?

Mr. Burns: I object.

Q. What was the thing you put in this envelope?

Mr. Burns: It still doesn't mean she found it.

A. Memorandum.

Q. Will you describe whatever it was that was enclosed in these envelopes?

A. I don't remember the description of it. I know that I put down a memorandum and sent them out as incomes that I had.

Q. I want to know what was on the piece of paper; was it a number on the piece of paper or a picture?

A. Different amounts of income.

Q. Would more than one amount be on one piece of paper?

A. Sometimes.

Q. Would anything else be on a piece of paper beside the amount?

A. Just income.

[fol. 1115-17] Q. The word "income"?

A. Yes.

Q. What were your instructions to Miss Paxson concerning those communications?

A. To keep them together until I was ready to make up the income tax for that year.

Q. All right. And when you did, at some time after the conclusion of the year, meet with Miss Paxson, what can you say concerning those memoranda?

A. I looked them over and gave them to Mr. Bewley and he added them up.

Q. What figure can you say was reached by that addition?

A. Merely the amount disclosed in each of the returns for commissions.

Q. What was the reason of having Judge Jeffers or his representative present?

A. He represented me in some real estate matters years past.

Q. Well, what did reference to that have to do with your income tax return?

A. Well, once in a while I might receive some interest on a mortgage or losses principally.

Q. He was there to report either gains or losses?

A. Income or losses.

Q. Did Miss Paxson handle your salary and other things for you, Mr. Johnson?

A. Most of it.

Q. What was that arrangement?

A. I beg pardon?

Q. What was the arrangement about your salary, depositing your checks?

A. She had a power of attorney.

Q. What did she do with it?

[fol. 1115-18] A. Do with the power of attorney?

Q. Yes, what did she do with it and what did she do as a result of the power of attorney?

A. She deposited checks and drew checks and paid bills for me.

Q. Was there any particular reason for that?

A. Merely a matter of accommodation.

Q. When you arrived at this figure that you called commissions what was your intention in regard to what you owed the government?

A. I intended to pay them all I owed them. I didn't want to cheat the government out of anything on income tax.

Q. Mr. Johnson, reference has been made to a letter of May, 1941 suggesting that you discuss with government representatives your income tax liability for certain years, on June 2, 1941. Do you remember receiving that letter?

A. Yes, sir.

Q. Did you do anything at all about it?

A. No, sir.

Q. Did you talk to anyone about it?

A. I talked to Mr. Rauffenbart.

Q. Did Mr. Rauffenbart advise you what to do in relation to that letter?

A. He said not to report.

Q. Did he tell you why he thought you should not report?

A. Because I was being investigated by a Grand Jury.

Q. And as a result you did not report; is that right?

A. I did not.

Q. Thereafter did you receive any process to appear anywhere?

A. In relation to the——

Q. In relation to this indictment we are trying here.

[fol. 1115-19] A. I received a subpoena to appear before the Grand Jury in Camden.

Q. Did you get some advice from your lawyers about that, Mr. Johnson?

A. Yes.

Q. And did you do what you did at that time on the advice of your lawyers?

A. Yes.

Q. Did you ever agree with anyone to sell protection to operate numbers in Atlantic City in these years?

A. No, sir.

Q. Did you ever agree to give anyone the privilege to operate numbers in these years?

A. I did not.

Q. Why didn't you return the entire amount from the moneys you received from Weloff as commissions?

A. Because I did not consider I owed on the entire amount. In other words, I would not receive the amount I paid out if I had not done the work that the money did for me.

The Court: Why didn't you report the entire amount and then report the deductions?

The Witness: That is where I made a mistake.

The Court: I am asking you why you didn't do it, not whether you made a mistake.

The Witness: I do not know.

The Court: Did you discuss the matter with Mr. Bewley who was making up the return as to whether you ought to do that or not?

[fol. 1115-20] The Witness: I did not.

Mr. Winne: I understand there is no legal ground for the Government claiming anything as to the form.

The Court: Except the question as to the intent. It is very material, it seems to me on the question of intent.

Mr. Winne: Nothing can be inferred from the fact that a return is filed in one form as against another form if any tax believable to be due is paid.

The Court: I think that is probably so, except it bears on the good faith of the taxpayer making the return in that form.

* * * * * * *

Q. Did you ever talk to anybody in 1935, 1936 or the first part of 1937, down to the 1st of November, about numbers in Atlantic City?

A. I suppose I have.

Q. Did you ever talk to any enforcement persons about it?

A. Not that I ever remember.

Q. Did you ever know anything about how these numbers people operated, Mr. Johnson?

A. No, sir; I was never in their place of business.

Q. Did you ever send for any of them and ask them for any money or anything of that sort?

A. No, sir; they came voluntarily.

Mr. Winne: That is all.

[fol. 1115-21] The Court: You never sent for them and asked them for contributions for a political campaign in November or during the campaign?

The Witness: No; they came voluntarily.

The Court: They volunteered that also?

The Witness: Yes.

The Court: In addition to the $1200 a week?

The Witness: Yes.

* * * * * * *

Cross-examination.

By Mr. Burns:

Q. Your 1935 income tax return reports salaries, wages or commissions, Mays Landing Record, $7,500. How was that sum arrived at?

A. I don't know.

Q. Well, what kind of income did you get from this Mays Landing Record?

A. Proceeds of the profit.

Q. Did you own the paper?

A. I was part owner and president of the company.

Q. Was it a corporation that owned it?

A. Yes, sir.

Q. Did you get a salary or dividends?

A. Both.

Q. Were you an officer of the company?

[fol. 1115-22] A. President of the company.

Q. Do you know how much of this $7,500 was salaries and how much was commission?

A. I do not.

Q. Did you receive the money in cash or by check?

A. Check.

Q. What happened to the checks when you received them?

A. Either deposited or cashed.

Q. Well, did you receive the checks yourself or did you let someone else receive them for you?

A. I don't remember about that.

Q. What was your usual custom in connection with Mays Landing Record checks?

A. I would receive them usually at the bungalow, I think, and send them up to the office after I endorsed them.

Q. Were they deposited in your bank account?

A. Most all of them, I think.

* * * * * * *

Q. Now, in 1935 you reported commissions from the American Oil Company of $2,706.04. Upon what were those commissions based?

A. On the statement rendered from the main office at Baltimore.

Q. What services did you render for those commissions?

A. Contacted different concerns, and they bought American Gas.

Q. In other words you acted as a salesman for the American Oil Company, is that it?

A. Yes; I was authorized under contract with them.

Q. So that in 1935 you had two occupations or jobs so far; one was that you were president of the Mays Landing [fol. 1115-23] Record, publishing a legal paper; another was that you were salesman for the American Oil Company; is that right?

A. Yes, sir.

Q. Were you also an administrator of the Johnson Estate in that year? You have reported $750 as commissions in that year?

A. Yes, sir.

Q. And besides that you were County Treasurer at a salary of $6,000 a year?

A. Yes, sir.

Q. Now, what year was it that you were Clerk of the Supreme Court?

A. I think from 1916 to 1921.

Q. Now, the money that you received from the American Oil Company, was that received in cash or by check?

A. By check.

Q. And who received and deposited that for you?

A. I think Miss Paxson in the office, in my office.

Q. And in whose bank accounts were the checks deposited?

A. Either in her account as power-of-attorney or in her individual account.

Q. You didn't have any bank account in your own name in 1935, did you?

A. No, sir.

Q. Nor in 1936?

A. No, sir.

Q. And none in 1937?

A. No, sir.

. . . . . .

Q. Now, in addition to being President of the Mays Landing Record, salesman for the American Oil Company, [fol. 1115-24] County Treasurer and administrator of the Johnson Estate, you also had another occupation, you say?

A. I was leader of the Republican organization or Party.

Q. Well, what actual position did you have in the Republican Party in 1935, '6 and '7?

A. Secretary of the County Committee.

Q. And were you elected to the office of County Committeeman?

A. In my unit in the Fourth Ward, yes, sir.

Q. So you were elected to the County Committee at an election, I presume a Primary Election along with the other members of the County Committee?

A. Yes, sir.

Q. How did you become Secretary, was that by election of the County Committee?

A. Elected annually at the organization meeting of the County Committee by the members.

Q. So during the years 1935, '6 and '7 you did hold an elective office, to wit: County Committeeman?

A. Yes, sir.

. . . . . .

Q. And as Secretary of the County Committee, what were your duties?

A. Keep the minutes of the County Committee.

. . . . . .

Q. Now, you say that you received political contributions as County Leader?

A. Yes, I received contributions.

Q. Well, in what capacity did you receive them?

A. As County Leader.

[fol. 1115-25] Q. Well, did the election law recognize the acceptance of contributions by a county leader?

Mr. Winne: That is objected to, your Honor please.

The Court: On what ground?

Mr. Winne: On the ground that it doesn't make any difference what the election law provides in the trial of this case.

The Court: On the subject of his intent, Mr. Winne, and that is certainly a very important element in the matter of intent whether he was complying with the election laws or violating them.

Mr. Winne: I respectfully disagree with your Honor and think that whether or not he was complying with the election law is not an issue in this case, and I except to your Honor's comment in that respect. I think it is entirely outside of this case and has no bearing on the filing of his income tax return in the month of March, what may have happened a year prior around election time.

The Court: It seems to me it has a bearing upon the question of whether he in good faith believed these contributions to be deductible from his income tax return, whether they were legal expenditures or not. It is one element.

Mr. Winne: Your Honor, I fail to follow at all why, because the election law let us say, provides for a campaign manager, it is any inference that some one else did not [fol. 1115-26] pay a proper tax because some one besides the campaign manager received money for political purposes. It is not at all unusual, in fact it is common practice for large sums of money to be spent outside of the campaign manager and outside of the County Committee and no unfair or improper inference can be drawn by it, and I insist upon my objection.

Mr. Burns: We ask that these questions be permitted and if the Court wants further argument we are prepared to argue it, but on the Court's own statement as to the purpose—that is one of the purposes and we should be permitted to go into it.

The Court: Are there any other purposes you have in mind?

Mr. Burns: That is the principal point, but he claims that he was in the business of politics and the Government denies that and wants to contest it and contest the payment of any expenses. If he claims he paid these expenses then we should be permitted to question him about it as to whether it violates the law or not and we should be permitted to ask him what his knowledge of these expenses is in order to determine whether he believed they were deductible.

Mr. Winne: The question as pending has something to do with "Did you receive these in violation of the election laws?" That is the objectionable question—not the probing into any expenses. I will stipulate, if your Honor desires for the record, that these moneys were not received as campaign treasurer, they were not received as Secretary of the County Committee. The legal effect of that [fol. 1115-27] may be, your Honor, if it ever becomes pertinent——

The Court: In other words, they were not received and disbursed in the manner laid down by the election laws of New Jersey.

Mr. Winne: I will concede that there is a manner laid down in the election laws for certain receipts and disbursements, which I claim does not apply to this situation at all, and that his receipts and disbursements are not outlined in the election law and are not forbidden in the election law.

The Court: That is a question of law.

Mr. Winne: I think so, and I do not think the witness can be asked that.

The Court: I think that is true.

Mr. Burns: We contend that these were paid. Now your Honor, reports are filed under the law for all moneys expended during any one year by anyone connected with politics.

Mr. Winne: That is not the law.

Mr. Burns: We can come to that. But we want to pursue this to try to show by other evidence that this defendant did not pay money in accordance with the law. Now, one thing that is forbidden is to pay money to newspaper men to influence votes or influence their editorials in favor of any political party or candidate. If this witness wants [fol. 1115-28] to claim that they paid that and some one

else says they paid it, we have a right to show if it was recorded in accordance with the law, and if it was not reported we can ask the jury to believe not that they violated the election law, but on the contrary, that they received the money and the failure of the money to show up in accordance with the report may be taken by them as an indication that the election law was not violated but——

The Court: What is the particular question?

Mr. Burns: We do not have the question.

The Court: Well, you have in mind what the question was?

By Mr. Burns:

Q. What authorization did you have to receive these political contributions?

Mr. Winne: I object to that, if your Honor please.

The Court: Ask him if he had any.

Q. Did you have any authorization to receive these political contributions?

Mr. Winne: I object; authorization from whom?

The Court: I will ask him a question. Did you have any authority given you by the County Committee to receive political contributions on behalf of the Republican Party in Atlantic County during these three years?

[fol. 1115-29] The Witness: No, sir.

The Court: Did the Committee have a treasurer?

The Witness: Yes.

The Court: Who was it?

The Witness: I do not remember.

The Court: You say you do not remember who the Treasurer of the County Committee was?

The Witness: It may have been Whitman or Macbeth.

The Court: Was there a Chairman of the County Committee?

The Witness: Yes.

The Court: Who was he during those years?

The Witness: I think that was Mr. Alger throughout that period.

The Court: What is his first name?

The Witness: Ernest.

The Court: During these three years and in the course of the campaign were campaign committees and finance

committees appointed by the Chairman or other persons in the County Committee to conduct campaigns?

[fol. 1115-30] The Witness: Appoint campaign managers?

. . . . . .

By the Court:

Q. I suppose, Mr. Johnson, the situation is that you took these contributions and made these disbursements without any formal authority from the County party, on the understanding that you had a right as an individual to do so, is that correct?

A. Yes, your Honor.

Q. Whether that was in accordance with the law, I suppose you are not prepared to say, not being a lawyer?

A. I don't know about that.

Q. You are not prepared to construe the New Jersey election law?

A. No.

. . . . . .

By the Court:

Q. Did you file any account anywhere or give anybody any account of these moneys that you received?

A. The only accounts I have are the receipts.

Q. Not payments, did you account for the receipts that you took, as you say, for political purposes?

A. No, sir.

Q. Did you file any expense account in any public office?

A. No, sir.

. . . . . .

[fol. 1115-31] By Mr. Burns:

Q. Well, you received money, you say, from Mr. Weloff as a political contribution about $1500 on occasions?

A. Yes, about three times, I think, three different years.

Q. Fifteen hundred dollars each time?

A. Yes, sir.

Q. You received other moneys from other persons, didn't you, also for political contributions?

A. Very small amounts which I turned over to the committee.

Q. To what committee?

A. Either the County committee or the campaign committee.

Q. In other words, either the County committee for regular purposes or for a particular campaign committee like a campaign manager?

A. That is right.

Q. And did you state to the campaign manager or County committee the source from which you had obtained the contributions?

A. I am of the opinion they are mostly in checks, payable to me, and I endorsed them to the County.

Q. You never got a check from Weloff, did you?

A. No, sir.

* * * * * * *

By the Court:

Q. Did you ever turn any of these $1500 payments or any part of them over to any other person for expenditure?

A. Not the official committees. I spent the $1500 around in the wards.

[fol. 1115-32] Q. That is not part of the moneys you say from time to time you turned over to the campaign committee?

A. No, sir.

By Mr. Burns:

Q. What money were you referring to a moment ago when you said you sent some money over to campaign committees or County committees?

A. Where someone would mail a check for $50 or give me $50 I would take it over to the regular campaign committee.

Q. When you received $1500 from Weloff wasn't that at the time of an election?

A. Yes.

Q. What did you do with it?

A. Spent it in the wards, to the ward clubs.

Q. In what manner?

A. Having precinct meetings, and they averaged $50 to a precinct, I think.

By the Court:

Q. You mean meetings in the interest of the Republican candidates at that time?

A. Yes, sir.

Q. Campaign meetings, in other words?

A. Well, precinct meetings to build up the precinct, 60 or 80 people.

Q. This was at election time, these payments were made?

A. Yes, at election times.

Q. There were Republican candidates then running for [fol. 1115-33] office in Atlantic City at that time that you are now talking about?

A. Yes, sir.

Q. And asking the people for their support?

A. Yes, sir.

By Mr. Burns:

Q. You say you spent this money like this $1500 from Weloff in support of candidates for public office, is that right?

A. Yes, sir.

Q. Well, did you report to the campaign manager of those particular candidates that you were spending money in their support?

A. No, sir.

Q. Don't you know that under the law that candidate was supposed to report any amounts that were spent in his support either directly or indirectly?

A. Well, there is a great question about that, whether a duly constituted club can spend money in the interests of perpetuating their club. Of course, indirectly the candidates would receive the benefit of it.

By the Court:

Q. You say all these expenditures then that you made were in perpetuating clubs?

A. Clubs and, yes, the average running expense of the concern.

Q. They were not made then for campaign meetings, as you just said, precinct meetings?

A. Precinct meetings, yes, the clubs held precinct meetings representing different leaders who constitute the club. [fol. 1115-34] Q. Public meetings?

A. Well, by invitation.

Q. Speeches made at the meetings?

A. Yes, by the workers.

Q. Advocating the election of the Republican candidates?

A. Republican ticket, yes, sir.

Q. Do the candidates attend?

A. Sometimes.

Q. Make speeches asking the people there to support them?

A. I imagine so, yes.

Q. You attended some yourself?

A. Oh, yes, made speeches.

By Mr. Burns:

Q. Now, when the election came around did you give any money to pay the watchers at the polls?

A. On election day I never used any money.

Q. Well, the day before election did you give any money that was to be paid to watchers at the polls?

A. It may have been going on, people who had been working as canvassers would probably carry on, but they weren't paid for election day work.

Q. They weren't paid for election day work?

A. No, sir.

Q. But they were paid for canvassing up to election day?

A. Yes, sir.

Q. Well, now, did you get any receipts for any of these sums of money you were spending or giving away for these meetings and things of that sort?

A. I have no receipts representing the $1500.

[fol. 1115-35] Q. No, I am asking whether you got any receipts for the money that you paid out to these precinct clubs for their meetings and things of that nature.

Mr. Winne: He said not representing the $1500.

Mr. Burns: Well, let him answer.

Mr. Winne: Well, he has answered, your Honor please, the question was asked and answered.

A. I paid out money the year round to clubs.

Q. Did you always get a receipt?

A. Not always.

Q. Well, when did you get receipts and when not?

A. I don't remember.

Q. Well, do you have any of the receipts now for the years 1935, six and seven?

A. Yes, sir.

Q. Can you show them to me, please?

Mr. Winne: We will have them in a few minutes, sir.

Q. Well, did you have any particular class of expenses for which you asked receipts?

A. No, I tried to get receipts for all money advanced for political purposes.

. . . . . .

Q. Now, in connection with the giving out of this political money, did you have any employees who helped you do that?

[fol. 1115-36] A. Which political money did you mean?

Q. You said that you were in the business of politics and you spent a lot of money. In that business that you call a business, did you have any employees?

A. The people who worked up in my office, they were employed by me but they were paid by the County.

Q. And they were paid by the County but they did your work as political leader; is that right, is that it?

A. Part of it.

Q. Did you have any employees of your own that you paid?

A. Yes.

Q. How many did you have during these three years, 1935, 1936 and 1937?

A. A chauffeur, and Kissel, and two maids. And I had an extra chauffeur now and then to take trips with children.

Q. In 1936 what was your occupation or your principal occupation?

A. Politician.

Q. You did not say that in your income tax return, did you?

A. No, sir.

Q. Why not?

A. I do not know.

Q. Did you say in your income tax return that your occupation was corporation executive?

Mr. Winne: The income tax return will speak for itself.

Q. The income tax return of 1936.

Mr. Winne: If you know. If it does I agree it does.

[fol. 1115-37] Mr. Burns: Let me show it to him. It is Exhibit G-2.

Mr. Burns: This says: "State principal occupation or profession, accounting for salaries, wages and commissions

in Item I"—"Corporation Executive."

The Witness: That is right.

Q. But you say that is not true?

Mr. Winne: I do not think that he said that. I think he said something quite to the contrary.

The Witness: I think politician is secondary to corporation executive.

The Court: That question, as I heard it read was "State occupation or profession, accounting for or out of which these salaries, wages and commissions were derived."

Mr. Burns: That is the way it reads.

The Court: You stated there that these commissions were derived from your work then as a corporation executive.

Mr. Winne: I do not think that is so stated.

Mr. Burns: Yes, it is right there. "Question 10."

Mr. Winne: Well, it is obviously ambiguous because different things come from different occupations in this particular person's return.

[fol. 1115-38] Q. Now, in 1937 what was your principal occupation?

A. That of a politician or political leader.

Q. Let me show you the 1937 return, question 1, "state your principal occupation or profession, County Treasurer." Is that right (indicating)?

A. That was because I was elected to that.

. . . . . .

Q. On your direct examination you testified about the manner in which your returns were prepared and you said something about some memoranda that you kept during the year. Now, tell us again for each of these three years how was the figure for commissions or other commissions arrived at?

A. I would keep the amount of income and deduct the amount of expenses.

Q. What did you keep it in? You said you kept the amount of income. You were getting $1200 a week, is that right?

A. Yes, sir.

Q. What memorandum did you keep?

A. Kept a memorandum of twelve hundred received and whatever was spent that week.

Q. That week?

A. That week.

Q. Did you keep a record of every penny that was spent?

A. It might not have been correct.

Q. It might not have been correct?

A. No.

Q. What kind of a record did you have each week?

A. Just on a memorandum sheet.

Q. What is that?

[fol. 1115-39] A. Memorandum sheet of paper.

Q. How could you distinguish between the $1200 Weloff gave you for protection and the $1500 he gave you for political contributions?

Mr. Winne: I object to the interjecting into the question of the word "protection", if the Court please. I think it is objectionable.

The Court: Objection sustained. I think that is objectionable.

Mr. Burns: If the Court please, I am trying to ask about specific money.

The Court: The weekly $1200, he said he got it every week during the year for 1936. This is injecting an element that confuses the answer you are seeking to obtain.

Q. How could you tell the end of the week which money you had spent from the $1200 and which you spent from the $1500 that Weloff would give you?

A. The $1500 only occurred once a year.

Q. Take the week that you got that, you also received the $1200, didn't you?

A. I suppose so. I think so.

Q. How did you keep track of which money you were spending and for what purpose?

A. One was a weekly occurrence and this is a yearly occurrence, and the $1500 I didn't have to make any accounting for, as I understood it, because it was a political contribution.

Q. What was the $1200?

[fol. 1115-40] A. The $1200.

Q. Yes.

A. It was a contribution to keep my political organization running.

Q. What was the $1500?

A. It was a contribution for the various, for the present campaign that was on.

Q. You distinguish between the $1200 that you used for the clubs every week and the $1500 that you used for the clubs one week out of the year, is that it?

A. Yes, you could put it that way.

Q. Is that the way you want to put it?

A. The $1500 was given to me to spend right around election time. It was an extra contribution, I should say.

Q. What kind of a memorandum did you keep of these expenses, these moneys that you were paying out?

A. Any time I would send four or five hundred up to the office I would put it down as an expenditure. When I paid the newspaper people I would put it down.

Q. Just describe for us, I don't understand what you put down on what, did you have a piece of plain paper or book or just what did you have?

A. I had a pad.

Q. Little memorandum pad?

A. Not too small. And put down the $1,200 and deduct what I had spent that week.

Q. Did you keep a record every day of what money you expended?

A. No, sir.

Q. How could you know at the end of the week how much you had spent?

A. Well, usually tell because the office money I would put [fol. 1115-41] down, the other expenditures were nearly the same, Herman and the newspapers.

Q. Leave aside these fellows on the newspapers. What other expenses did you write down, you say you gave a lot of money away for clubs and precinct meetings and things of that nature, did you write them down?

A. I wrote down the total that I sent up to the office.

Q. Did you keep any record of what was given away?

A. Through the office, you mean?

Q. No, you, did you personally keep any record?

A. No, I would go out and probably someone would stop me and say they needed some coal or their wife was ill, the children had to have clothes, or something like that, and I would give them some money.

Q. Did you keep a record of that?

A. No, sir.

By the Court:

Q. Are you claiming items of that kind as a charity?

A. No, sir.

Q. They are not included in this?

A. No, sir. We have receipts for what we paid, your Honor.

Q. Did you deduct them at that time you say you made certain deductions, did you deduct those items every week?

A. I sent the total amount of money up to the office to take care of those items. They distributed through there and took the receipts.

Q. Did you deduct the total of that money from the $1200 to determine the amount that you were going to report?

A. Yes, sir.

[fol. 1115-42] The Court: Then you did claim those as deductions. You didn't understand my question.

Mr. Winne: I think your Honor is confused. I think the witness answered properly. I don't like to state it.

The Court: He says, as I understand it, that those payments were for, let us say, charitable contributions to individuals for coal, rent, and so forth, that they were made through his office ordinarily, and that he sent the money up every week to cover those payments. Is that right?

The Witness: Every week or every other week.

Q. Whenever it was needed?

A. Whenever it was required.

Mr. Winne: But they included a great many other things, your Honor.

The Court: But these were included in the sums sent up to the office, which sums were deducted in figuring what he believed to be his net income.

Mr. Winne: That is the way I understand the testimony.

The Court: So these, what I might describe as charitable contributions to individuals, were taken, under your theory, as deductions for income tax purposes?

Mr. Winne: Let me state where the record is in some confusion. I think you asked the witness, either you or Mr. [fol. 1115-43] Burns, whether he did not from time to time give people on the street moneys for charitable purposes, and I think the witness said he did and he did not deduct that from the $1200 a week.

The Court: I think I understand that. In those cases, not having gone through the office, you kept no record at all of those where you were touched, so to speak, on the street and handed out a five-dollar bill or something of that kind?

The Witness: That's right, your Honor.

The Court: That you haven't any record of *of* any kind?

The Witness: No, sir.

Q. Now, did you personally get a receipt for any money you gave out, outside of these newspaper men?

A. Personally get them?

Q. Yes.

A. I don't think so.

Q. Well, did you keep——

A. The receipts were all handled through the office. That's the reason I have them.

Q. Which office do you mean?

A. My office do you mean?

A. My office in the Guarantee Trust.

Q. You mean Miss Paxson?

A. Yes.

Q. That is the County Treasurer's office?

A. Yes, sir.

Q. In other words, you sent money up to Maie Paxson, [fol. 1115-44] and either she or Mr. Boyd gave it according to whatever purpose was necessary?

A. Mr. Boyd handled it most of the time.

Q. Was he in your office?

A. No, he is Clerk of the Board of Freeholders on the same floor.

Q. Well, now, I just want to get this straight if I can: When you sent money up to the office did you send the money to Maie Paxson or to Boyd?

A. To Boyd.

Q. Did you send any record of it to Maie?

A. No, sir.

Q. Did you keep a record of it?

A. Yes, sir.

Q. In other words, when you sent money to Boyd you made a notation of it?

A. That's right. Then when I got ready to send every month or few months, I would send memorandums up showing what my net income was during that period; they would be filed until I made up my income tax.

Q. And how long did you keep up that practice?

Mr. Winne: I object to anything outside of the scope of the indictment, your Honor please.

Mr. Burns: This is cross-examination.

The Court: Objection overruled.

Mr. Winne: I want to urge that nothing after the date, the end of 1937 is admissible, if your Honor please; you cannot certainly show a course of conduct after the event. It is like saying "What did you do today", to show what you might have done three or four years ago.

[fol. 1115-45] Mr. Burns: It is on the question of the credibility.

The Court: I think it is admissible. I have overruled the objection.

A. What was the question?

Q. (Question repeated by the reporter.)

A. During this period.

Q. What period?

A. '35, '36 and '37.

Q. What about '38?

Mr. Winne: Now, that is objected to for the same reason, your Honor please.

The Court: Objection overruled.

(Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.)

(Sealed.)

A. Yes, I carried on the same policy in 1938.

Q. How about 1939?

Mr. Winne: Same objection.

The Court: I will sustain the objection as to '39.

Mr. Burns: If the Court please, I think for the purpose of testing his credibility I can ask this question. It is the same as '38. We are not bringing in the income tax returns; I think it is a question of the procedure that we are attacking.

[fol. 1115-46] The Court: I think it is too remote.

Q. Well, did you pursue that same policy in 1934?

A. I think so, yes.

Q. Don't you know whether you did or not?

A. No, I do not positively.

Q. Well, you were receiving money from Weloff in 1934, weren't you?

A. Yes, sir.

Q. What kind of a record did you keep of it in that year?

A. I probably kept the same kind; I just didn't remember positively.

Q. Well, now, just what kind of records did Miss Paxson have at the end of the year with reference to this money that you are talking about?

A. Just this Weloff money, is that the money you are talking about?

Q. Yes, the numbers money.

A. The numbers money—well, she had these memorandums and would bring them down when I went to the office and she would give them to me and I would give the amounts to Mr. Bewley and he would total them. He would ask me if that was my net income and I would say "Yes."

Q. I want to know what these slips showed at the end of the year. Did they show the $1200 for each week recorded as received?

A. No, they showed the net amount. Not necessarily each week. Sometimes it covered a month, most of the time it covered a month.

Q. How did you keep your records over a period of a month before you made up this memorandum for Maie Paxson?

[fol. 1115-47] A. I put down anything that I used on the pad.

Q. What did you do,—have a pad on the wall and any time you gave out any money, write it down?

A. No. In the closet.

Q. In the closet where you kept the tin box?

A. Where I kept the file with my papers, yes.

Q. You had a pad in there?

A. Yes, on the shelf. That was locked.

Q. Is that where you wrote down these expenses whenever you gave out money?

A. Yes. I did not do it daily, whenever I thought of it. I could remember a little.

Q. You could not say that these records you kept were anywhere near accurate, could you?

A. Yes.

Q. How could you?

A. Because they were as to expenditures.

Q. Were those records accurate as to your receipts?

A. Yes.

Q. Did you record the $1200 on your sheet each week to show that you had received it, that is, on this pad?

A. Not necessarily each week.

Q. Did it come in every week?

A. No, not every week. Sometimes whenever they were away I think there was two or three weeks before they turned the money over to me.

Q. Then they made up for it by bringing the amount for each week?

A. Yes.

Q. Now, on these sheets you kept in this pad you did, you say, record the equivalent of $1200 for each week, totalling at the end of the year approximately $62,000. Is that right for 1936?

[fol. 1115-48] Mr. Winne: I object. There was only one year it was $62,000. That is the evidence. That is what Miss Paxson testified to. The first year it was 46,000.

The Court: It is for him to say. He has more familiarity with it than anybody else.

Mr. Winne: I object to the question because it has contained in it an assertion supposed to be based on the evidence in this case which is erroneous.

The Court: Read the question.

(Question read by the reporter.)

The Court: What is the objection?

Mr. Winne: I did not hear the question for 1936. I will withdraw the objection.

A. That was the total amount they turned over to me.

Q. No doubt about that, is there?

A. No, sir.

Q. These weeks when Weloff happened to be in Florida, you got paid for those weeks, didn't you?

A. Yes.

Q. And whether Max Weloff or some one else was the one who took it, you got it?

A. Yes.

Q. How about 1937? Did you record $1200 weekly each week in 1937?

Mr. Winne: Until November 1st.

[fol. 1115-49] Mr. Burns: Now, that is the part I object to.

The Court: You are out of order on that. The objection is overruled. You are not ahswering for the witness. He is answering for himself.

Mr. Winne: I am sorry, your Honor.

The Court: You might take your seat and permit the examination to continue.

A. Up until the time Mr. Weloff stopped receiving the money.

Q. Didn't you get that $1200 every week right up until the end of the year?

A. No, sir.

Q. Didn't Jack Southern bring that money to you after Weloff stopped?

A. No, sir.

Mr. Winne: Your Honor, at the risk of having you displeased——

The Court: You cannot displease me.

Mr. Winne: I object to any testimony concerning any date after the evidence testified on direct by the Government witnesses, which was November 1st, 1937.

The Court: Your objection is overruled.

Mr. Winne: May I have an exception?

The Court: You may have that exception and an except-[fol. 115-50] tion to any question of a similar nature thereafter, but I do not think it is fair to raise it as a means of intimating to the witness——

Mr. Winne: I might say I never had such intention.

The Court: But it seems as having that effect.

Mr. Winne: I am sorry. I never had that intention. I hope you and counsel will agree I did not.

The Court: Well, I believe you.

* * * * * * *

Q. At the close of the session yesterday you testified that this system that you used of keeping track of the money you received from the numbers, and the money you expended by using memoranda, continued throughout the years 1935, 1936 and 1937; is that right?

A. Yes.

Q. Well, now, in so far as that system of keeping memoranda was concerned, you say that at the end of each year

the computation was made and placed on your income tax return as "Commissions"; is that right?

A. Yes.

Q. Well, now, did you have any other moneys that you received during the years 1935, 1936 and 1937 which were included in the computation which went on the return as "Commissions"?

A. Only from the numbers money.

Q. Only from the numbers money?

A. Yes.

Q. And the use of that term "Commissions" on those [fol. 1115-51] three income tax returns was solely related to money from the numbers; is that right?

A. Yes.

Q. From no other source?

A. No, sir.

Q. Did you receive any money in 1935, 1936 or 1937 for political purposes or any other purposes that you did not include in your income tax return?

A. Nothing except the $1500 that I received from Mr. Weloff during the years 1935, 1936 and 1937.

Q. Now, why didn't you include the $1500?

A. I did not think it was taxable.

Q. What was the difference between the $1500 and the $1200?

A. Well, one was a direct political contribution, as I considered it, during election time.

Q. What was the other. Which was the direct political contribution?

A. The $1500.

Q. What do you call the $1200 a week?

A. Well, that was a political contribution to carry on during the year.

Q. And you say that in the three years you did not receive any other money for political contributions, either directly or indirectly, except this money from the numbers?

A. That is all.

Q. And at the end of each year in making up your income tax return, the money shown as "Commissions" was related solely to money you received from numbers?

A. Received from numbers through Mr. Weloff and Mr. Towhey.

Q. Did you receive any money from numbers in 1938?

[fol. 1115-52] Mr. Winne: I object to that, if your Honor please.

The Court: On what ground?

Mr. Winne: It is outside of the scope of the indictment.

The Court: It is proper cross examination.

Mr. Winne: I do not see how it can possibly aid in the inquiry concerning this indictment.

The Court: On the question of credibility. This man is under cross examination.

Mr. Winne: I understand that perfectly but under cross examination you cannot examine him about anything not relevant to the issue.

The Court: That statement isn't so.

Mr. Winne: Then I object to it, if your Honor please, on the ground that it may have a tendency to prove a different offense than the offense charged in the indictment.

The Court: The objection is overruled.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed.)

Mr. Burns: If the Court please, I will repeat the question.

[fol. 1115-53] By Mr. Burns:

Q. Did you receive any money from numbers during 1938?

A. Yes, sir.

Q. Who gave it to you?

Mr. Winne: I object to that, if your Honor please. I think perhaps we should have argument upon this question because I can see what it is opening up if it is allowed to proceed. I think it is highly objectionable to inquire into a situation which, according to public newspaper articles is going to be the subject of another indictment against this defendant, quoting Mr. Burns. I think the defendant is entitled to be protected.

The Court: We will argue this point. Mr. Burns, you may argue it.

Mr. Burns: In the first place, what the newspapers may say or not say has nothing to do with the case.

Mr. Winne: Don't you think we should argue it out of the presence of the jury?

The Court: Very well. I will excuse the jury. The jury may take a recess.

(The jury withdrew.)

Mr. Burns: If the Court please, as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the argument, and that when he resumes the stand he should do [fol. 1115-54] so without having any opportunity to hear what the argument is about, and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.

The Court: I think that is a fair request. You may retire, Mr. Johnson.

(The defendant withdrew.)

Mr. Burns: Now, if the Court please, the purpose of the trial of a law suit, as I understand it, is to get at the truth. The purpose of the cross examination of each witness is to get at the truth. It is not supposed to be a game where one side sees what evidence the other has and then tries to have a defense based on that evidence. During the course of the government's case the defense endeavored to establish that the defendant received no money from numbers after March of 1936. Time after time in the cross examination of witnesses they endeavored to limit the time period when Mr. Johnson got this money to 1935, up to March of 1936. When they failed in that and it appeared that the money was given to him directly up until November 1st, 1937, then they go on the stand and they willingly admit that they got the money up until November 1st, 1937. I say right there there is an argument and an inference the jury can draw as to the good faith of the defense.

The defendant has contended that he did not get money from numbers after November 1st, 1937 because he didn't get it from Jack Southern. The government doesn't vouch for the testimony of Jack Southern. The government contends that the defendant got the money from Jack Southern [fol. 1115-55] or it did come from somebody else continuously throughout 1937 and continuously after 1937. The defendant is trying to claim that on his income tax return he did report some of the money received from numbers. He claims that he used the term "commissions" for that purpose. The government contends that the use of the

phrase "commissions" does not refer to money from numbers and that the amounts reported on the return under "commissions" have nothing to do with the income charged by the government as having not been reported.

In cross examining the defendant he has stated that the only use of the word "commissions" by him was in connection with numbers income and that the only use of this system of recording by memoranda the amounts received from numbers and the amounts expended was in connection with numbers income.

Now, he has admitted that he received numbers income for 1938. Certainly it is most relevant to the issue in this case in order to establish the real truth to find out whether he didn't continue to get money from the numbers either from Jack Southern or somebody else after November, 1937, and it appears to be a pure concoction of a defense to permit a defendant to come on the stand and through direct questions of his counsel admit certain things up to November 1, 1937; and that the Government is not permitted to go beyond that. And here we have a direct admission by the defendant that he got money beyond that time and we should be permitted to show that he got that money through dealings in 1937; that he has already committed perjury before this jury and that the defense he is giving to the jury is a false defense and not based on facts. I contend we should be permitted to ask him whether he received numbers money in 1938, whether it wasn't a continuous practice all though 1937, including the last two months; whether there isn't [fol. 1115-56] another $10,000 approximately directly concerned in that 1937 return about which he had intended to say nothing, thinking he could get by with it.

We should also be entitled to ask whether or not on his 1938 return he did not continue to use that term "Commissions" and to ask him what it was for. Now, if it wasn't for numbers in 1938 and had no connection with it then, according to his testimony that the system was continuous——

The Court: I will be glad to hear from Mr. Winne.

Mr. Winne: Of course, it is a little difficult to answer a legal argument when there is not a proposition of law advanced or any case referred to or a theory of law but merely discussion of why the Government wants to do a

certain thing. I want to say first, I never heard it propounded before that a defendant in a criminal trial was under any obligation to offer his defense until the Government had proved some kind of case against him. I don't think any criticism or interference can be directed at this defendant or his counsel——

The Court: Well, we can forget that.

Mr. Winne: Yes. If we could have established on their case that there was no money paid after 1936, the could would go out, and nobody says we haven't the right to do that. What we are talking about now is the scope of cross-examination of the defendant. I want first to say in the Philadelphia Record of Sunday, July 1, 1941, appears an article quoting Mr. Burns as follows, "Indictments will be sought on 1938, '39 and '40 returns of Enoch L. Johnson on the basis of Nucky's tax returns for 1938, '39 and '40, said [fol. 1115-57] Joseph W. Burns, Special Assistant Attorney General in charge of the prosecution."

Now, the rule as to the cross-examination of a defendant as stated in the Federal courts is that the Court is required to follow the common law of the state in which it sits. As the law existed at the time of the passage of the Judiciary Act in 1789, Funk vs. U. S. 290 U. S., 371. The question then is what was the law of New Jersey in regard to the cross-examination of defendants. Defendants were originally, in New Jersey, excluded from testifying in their own behalf. It was not until 1878 in New Jersey, that defendants were permitted to testify in their own behalf.

The Court: Then there cannot be any common law on the subject in New Jersey.

Mr. Winne: There is, however, law in the State of New Jersey in existence at this time.

The Court; That has no bearing on the question, under the cases, if the common law as it existed in 1789 has been changed by any law made by the State of New Jersey.

Mr. Winne: Your Honor may be right. I didn't so understand it.

The Court: I think that is the law, I have looked into that a good many times.

Mr. Winne: Well, if your Honor please, I will proceed then to the argument of what the law is in New Jersey [fol. 1115-58] today as declared in the Federal cases on this subject.

In the case of Raffel v. United States,—I have it 494 but that must be wrong.

Mr. Burns: A Supreme Court case?

Mr. Winne: 494?

Mr. Burns: That is 271 U. S., 494.

Mr. Winne: I have it backward. 271 U. S.?

Mr. Burns: Yes.

Mr. Winne: When the defendant takes the stand, he does so as any other witness and within the limits of the appropriate rules he may be cross examined as to the facts at issue.

Our cases in New Jersey hold the defendant like any other witness is entitled to have his cross examination limited to the subjects originally opened up by his examination in chief. He subjects himself to the same liabilities; he is entitled to the same privileges as any other witness. That is State against Sprague, 64, N. J. L., 420; Bullock against State, 65 N. J. L., 557.

In the last case, the Court said where the cross examination was not confined to the scope of the direct examination the State was bound by the answer, and testimony could not be brought in to contradict him in respect of such testimony.

The Court: Mr. Winne, isn't this directly bearing upon his credibility?

[fol. 1115-59] Mr. Winne: I can't see, if the Court please, how when I asked nothing about any time following the period mentioned in the indictment the government can be permitted to inquire into anything that happened after.

The Court: I said isn't it on the question of credibility?

Mr. Winne: If the Court please, on that subject, I want to say that regardless of whether I am right in any of my other contentions that this is improper cross examination, as outside the scope of the direct, it is an attempt on the part of the government to force from the witness who is not immune from testifying as to things which are on trial here before the Court, but who has the same immunity as anyone else from testifying from any other thing than that which is on trial before the Court, that this is an improper cross examination for the reason that it is directed to a future prosecution.

The law in that is stated as follows——

The Court: Well, it may be that he might claim his constitutional immunity. I think he would have to claim it, though, wouldn't he?

I have not thought this thing through. If he wishes to say that his answer to that question is likely to incriminate him with regard to another offense, doesn't he have to make that claim? It is relevant otherwise, certainly, on the question of credibility.

Mr. Winne: The claim is now made on his behalf that in view of the avowed threat of the government to prosecute him for the very years concerning which he is now asked to [fol. 1115-60] testify, that it is improper, and the Court should take recognition of the fact.

The Court: It is not for you to state that. He is the one that has to make the claim. You don't have knowledge of the facts.

Mr. Winne: I have knowledge——

The Court: You have knowledge of such facts as he has communicated to you, of course.

Mr. Winne: Because, if the Court please, that the man is testifying under an open threat of prosecution for the year 1938, it is perfectly obvious that counsel to protect the witness should do everything legal and reasonable to exclude anything about 1938, because we don't know what the government's ground of attack is going to be.

I press my objection regardless of whether the claim is made by the witness or not, in view of this avowed intention on the part of the government that——

The Court: The witness may not wish to make the claim. He may prefer to tell the whole truth.

Mr. Winne: I am urging the objection regardless of what the witness——

The Court: You may advise him of his rights, of course, but it is for him to determine whether or not he wishes to take advantage of them, it seems to me.

Mr. Winne: I would like to just give your Honor what I conceive to be the law on the subject of incriminating himself.

[fol. 1115-61] The Court: Very well.

Mr. Winne: When the accused voluntarily offers himself as a witness the waiver of witness' constitutional privilege is waived and he may be asked questions on cross which tend to incriminate him so long as they are material to the

issues and would be proper on cross examination of any other witness. He can't, however, be compelled to give self-incriminating testimony as to another offense wholly unrelated to the one for which he is on trial.

That is from Woreman against Commonwealth, 203 Ky., 37, and State against Allemand, 153 La., 741, and Peo against Johnson, 228 N. Y., 332.

In that Caminetti case, which is a well-known case on the subject, I think the rule is declared to be there is no difference between the defendant as a witness on cross examination than any other witness, he is subject to the same rules.

Mr. Burns: If the Court please, I made my argument, but the assertion that the government has threatened to indict this defendant or to take any action with respect to any possible law violations for 1938 and 1939 I feel I must answer.

I make it a practice not to make statements to the press or to try cases in newspapers. There have been several statements in the press made by defense counsel. I deny having made the statements printed in the Philadelphia Record. I never made any statement that the government intended to prosecute the defendant, Enoch L. Johnson, for the years 1938 and 1939.

After a letter was introduced in evidence here stating that the defendant had been offered an opportunity to explain discrepancies for the years 1935 to 1939 inclusive, [fol. 1115-62] I was asked by some reporters what that meant, and I told them that it meant that the government had what it said, and that they made an investigation, and that is all I said. I never said,—in fact,—the article said something that even during this trial I might present an indictment, which is kind of ridiculous, I certainly would not have much time. I don't think it is proper to hold anybody, I don't even hold defense counsel to anything that is printed in the newspapers as to quotations alleged to have been made by them. I think it is improper to charge counsel in court with statements printed in the newspapers. I think the Court should not take into consideration in any way any argument based on that allegation.

The Court: What about this matter of incrimination? You have not argued on that. I would like to hear you on that, Mr. Burns.

Mr. Burns: The defendant has stated that he did not receive——

The Court: Mr. Winne objects on the ground that this testimony might incriminate him for 1938.

Mr. Burns: It can't incriminate him if he is telling the truth with reference to his testimony already given, because he said he didn't get any money from numbers; his first statement was he didn't get any money from numbers after November 1, 1937. Now, even if he did get money from numbers in 1938 if he reported it on his income tax return in the same manner as he claims in 1935, 1936 and 1937 and spent the difference for political purposes, and he did that in good faith, he would not be guilty of any offense for 1938 any more than for 1935, 1936 and 1937. In [fol. 1115-63] other words, if his defense is sustained, as he states it to be for 1935, 1936 and 1937, he is not guilty of any offense even though he owes the tax. I say he was wrong, they were not proper deductions and he will have to pay the tax on it, but that wouldn't make him guilty of an offense if that is believed, and the same is true for 1938.

The Court: Of course, that is true if his statement is true and he carried on the same practice in 1938 he would not be guilty of the offense, there would be nothing for which he could be incriminated.

Mr. Winne: Where government counsel misses the point is the witness may not be asked not only those things which prove him guilty but those things which have a tendency to prove him guilty. I don't think we can be said not to be protected by the fifth amendment because if we have some kind of defense we can't be convicted. The question is can we be compelled to offer evidence that can be offered against us in a future prosecution?

Mr. Burns: The point is, as a practical matter, if this jury accepts the defendant's testimony that he did not intentionally file false returns for 1935, 1936 and 1937, there is not any reason to believe that another jury would not believe it for 1938. The thing is tried out once and for all on this issue, not legally——

Mr. Winne: And Mr. Burns says we speculate on the outcome of the trial and make the defendant testify because maybe he will be acquitted.

The Court: That is not a legal argument. It seems to [fol. 1115-64] me that the testimony is perfectly relevant and material as cross examination directed to credibility.

In view of the witness' testimony, unless it runs afoul of his right not to be required to incriminate himself, it seems to me that that is a right which he may waive or claim, and that that is a personal right that he may be advised by counsel when a question is asked, and that he will have to determine himself whether he is going to claim it or not.

Mr. Winne: Your Honor will allow an exception to the admission of the question?

The Court: Well——

Mr. Winne: I have objected to the question, if the Court please, and stated my reasons.

The Court: Yes, you may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed.)

The Court: I think, after all, the government is entitled to some latitude on cross examination.

This man has offered himself as a witness in his own defense; his credibility is directly in issue. I feel that testimony as to his practice in the next year as to whether it was the same or not directly bears upon the credibility of his story as to what he did in these years.

Mr. Winne: The question is did he receive moneys in the next year from numbers, that is the pending question. [fol. 1115-65] The Court: It is obvious that the next question would be, did you report them as commissions, and then how was your income tax made up.

Mr. Winne: I bow to your Honor's judgment, and will you allow me an exception?

The Court: I will allow you an exception. I will permit you, after the question is asked to advise him about his rights.

(Jury returns to courtroom.)

Enoch L. Johnson resumes the stand.

The Court: Now, the question will be repeated.

(Last question and answer read by the reporter.)

Mr. Winne: Now, if your Honor please,

(Conference at side bar between Court and counsel.)

Mr. Winne: Mr. Johnson, the Court has permitted me to state to you that under the 5th Amendment to the Constitution of the United States, you cannot be compelled to give testimony against yourself which might incriminate you or which might tend to incriminate you with reference to any other charge except the charge that is being tried here today. Do you understand what I mean? You may claim that privilege or you may not, and I state that to you with reference to this question and any question that follows. Do you understand?

[fol. 1115-66] The Witness: Your Honor, I claim the privilege.

The Court: You claim the privilege. In other words, you take the view the answer to this question may tend to incriminate you on another charge?

The Witness: Yes, your Honor.

The Court: All right. You may decline to answer.

Well, Mr. Johnson, you testified that you did receive some numbers money in 1938. I believe you answered that. Now, what about the last two months in 1937?

The Witness: I answered that "No, sir."

The Court: Do you still make the same answer?

The Witnes: Yes.

By the Court:

Q. Well, you receive- $1200 a week up until what time in 1937?

A. Around the 1st of November of 1937.

Q. Did you have any discussion with anybody with regard to the fact that that was not paid after that date?

A. No, sir.

Q. You made no inquiry?

A. No, sir.

Q. No one talked to you about it or gave you notice that you were not going to get it?

A. No, sir.

Q. Do you know whether it was paid to anybody else during those two months?

[fol. 1115-67] A. Only what I heard here.

Q. Only what you heard in court here?

A. Yes.

Q. What fund did you use during November and De-

cember of 1937 to pay these expenses that you had been paying out of this fund?

A. Money that had been accumulated.

Q. What money did you use in 1938 for that purpose?

Mr. Winne: Your Honor will allow me an exception.

The Court: He may decline to answer if he wishes.

The Witness: I exercise my right under the Constitution.

The Court: You decline to answer on the ground that it might tend to incriminate you on another charge?

The Witness: Yes, your Honor.

Mr. Burns: I think that the defendant should be informed that that privilege must be claimed in connection with some Federal offense and not a state offense.

The Court: Yes, that is true. That is the law.

Mr. Winne: Yes, that is right.

The Court: The fact that this might incriminate you of some state crime—well, I do not know what, let us say assisting in the maintenance of a gambling operation or something of that sort, which may be a crime under the laws of the State of New Jersey—is no ground for your [fol. 1115-68] claiming that privilege. It must be that you feel this will incriminate you of some Federal offense under the laws of the United States.

The Witness: I understand that.

Mr. Winne: Either incriminate or tend to incriminate him.

The Court: Either incriminate or tend to incriminate you. That is the law. If in his opinion he believes that it might tend to incriminate him, he may claim the privilege.

Q. Didn't it strike you as rather strange that after you had been receiving this $1200 a week for nearly three years, or two and one-half years, it was suddenly cut off without explanation?

A. Yes, but originally they volunteered it.

Q. And you felt that you had no right to make any inquiry about it?

A. No demand or inquiry.

Q. It rather vitally affected your financial position, not having this $1200 a week coming in, didn't it?

A. It made some difference to it.

Q. But you say, as I understand it, that you made no inquiry and had no discussion with anyone with regard to continuing that payment?

A. Yes, your Honor.

Mr. Burns: Mark this for identification.

(Paper referred to received and marked Exhibit G-41 for Identification.)

[fol. 1115-69] Q. I show you Exhibit G-41 for Identification and ask you if that is your signature?

A. Yes.

Q. Is that your income tax return for the year 1938?

Mr. Winne: That is objected to, if your Honor please.

The Court: I think the thing for him to do is to——

Mr. Winne: I thought aside from the question of privilege your Honor had ruled, and I thought we had it in the record—we are not bringing in the income tax return of 1938.

The Court: I think it may have a bearing on the question of credibility. I have ruled that these questions are material on the question of credibility. I think that is obvious.

Mr. Winne: Then if your Honor will allow me an exception to the ruling.

The Court: Yes. You may have an exception.

Which exception is hereby allowed and sealed accordingly. (Sealed.)

Q. Mr. Johnson, examine this paper and tell us, if you can, what it is?

A. My income tax return for 1938.

Mr. Burns: If your Honor please, I had marked an [fol. 1115-70] original, and I would like to now substitute as Exhibit G-41 for Identification a certified photostatic copy.

Mr. Winne: If your Honor please, it is objected to——

The Court: Do you object to substituting the copy?

Mr. Winne: Oh, no; I do not mind marking the copy.

Mr. Burns: Mark that (indicating) G-41 for Identification, in place of the original.

(Photostat copy of G-41 for Identification substituted for original and marked G-41 for Id.)

By Mr. Burns:

Q. Mr. Johnson, did you have an item of "Other commissions" for the year 1938 as part of your income?

Mr. Winne: Might I advise the witness that he need not answer if he claims the privilege?

Mr. Burns: He has already been advised. He cannot be advised as to each question.

The Court: He knows his rights. How can this incriminate him? He is asked if he had an item in his return.

Mr. Winne: My contention is that the return is not evidential in the trial of this indictment.

The Court: You may ask the question. The objection [fol. 1115-71] is overruled and an exception allowed to the defendant.

Which exception is hereby allowed and sealed accordingly.

(Sealed.)

A. Have I a right to refuse to answer?

The Court: You have a right to refuse to answer if you feel the answer to this particular question might tend to incriminate you. Repeat the question.

(The question was read by the reporter.)

The Witness: Yes.

Q. What money did that represent?

A. I refuse to answer on the grounds that I do not have my records here, and on my rights under the Constitution.

The Court: You may decline to answer upon the ground that it might tend to incriminate you, not upon the ground that you do not have your records here. You might say you do not know, if that is a fact.

The Witness: All right; I refuse to answer as it tends to incriminate me.

Q. Mr. Johnson, when Mr. Weloff first came to you in or about 1933 and told you that the numbers banks were willing to pay you $125 a week what did he tell you they were giving you the money for?

A. To help me along with my political work.

[fol. 1115-72] Q. What were you to do for them?

A. No discussion of that.

Q. Well, what did he tell you when he came to see you?

A. I can't remember generally.

Q. How much money did he say he was going to give you or bring to you?

A. He testified, I think, to——

Q. Not what he testified, I am asking you what happened in 1933.

A. I don't remember.

Q. Well, did he tell you that he was a member of a numbers bank and operated a numbers game in Atlantic City?

A. I think he did.

Q. You knew at the time that that violated the laws of the State of New Jersey, did you not?

A. I suppose it did.

Q. I am asking you not what you suppose but you knew that, didn't you?

A. Yes, if they got caught.

Q. What's that?

A. If they got caught.

Q. Oh, is that the test that you apply, that it only violates the law if you get caught?

A. Not necessarily.

Q. Well, did you undertake to keep them from getting caught?

A. No, sir.

Q. You agreed to accept $125 from each of the numbers banks operating in Atlantic City, did you not?

A. I agreed to accept whatever money Mr. Weloff brought to me.

Q. Didn't he tell you he was going to bring you $125 [fol. 1115-73] from each of the numbers banks that was operating in Atlantic City?

A. I don't remember that. I think he told me he was going to bring me $725 or $825.

Q. Had he ever brought you any money before that time?

A. Not that I remember.

Q. He told you he was going to bring your $725 or $825 a week?

A. Yes, sir.

Q. Well, was it customary for you to have people come to you and offer you large sums of money weekly?

A. No, sir.

Q. Yet you cannot remember any of the conversation that happened when he came to offer you the money?

A. No, I cannot remember any particular conversation.

Q. Well, didn't he tell you that the numbers banks wanted to pay for the privilege of operating their games?

A. No, I don't remember those words. Something about wanted to help me along politically.

Q. Well, didn't they want you to help them along too?

A. Well, I suppose so but they thought if my candidates were successful that they would be allowed to operate, I suppose, along the lines——

Q. Why would they be allowed to operate if your candidates were successful?

A. Because my policies were such that I believed in that sort of amusement.

Q. Well, you mean you were to convey to your candidates your beliefs on this sort of amusement?

A. Not personally. They knew it by my expressions and public utterances.

Q. You mean that you made public utterances with reference to the numbers game?

[fol. 1115-74] A. I might have, yes, sir.

Q. Well, do you say then that the reason that Weloff brought that money to you was because the candidates who were sponsored by you and elected by you were to carry out your policies of not prosecuting them for operating this numbers game in violation of the law?

A. Not necessarily prosecute them.

Q. Well, not arrest them?

A. If there were any charges against them I suppose the officials would take action.

Q. The point was that there shouldn't be any charges against them, isn't that it?

A. Well, I guess they didn't want any charges against them but, of course, I guess they couldn't stop that now and then.

Q. Now and then. But outside of now and then the policy was not to have them molested, isn't that so?

A. No, I shouldn't say that.

Q. Well, what do you say?

A. Just what I have said.

Q. Well, didn't Mr. Weloff give you the money with the express understanding that you would use your influence to protect the numbers men from molestation by the police?

A. No, sir.

Q. What were they to get from you for this $800 a week?

A. Not anything in particular. They gave me this money to carry on the work that I was doing, carry on the organization.

Q. And he continued to bring that money to you every week, didn't he?

A. I don't remember about that.

The Court: Was it understood that it was all to be used for that purpose, Mr. Johnson?

[fol. 1115-75] The Witness: Not if I saved anything, I could appropriate it to my own use.

The Court: That was understood or that was your understanding?

The Witness: It was my understanding.

The Court: Did you have any discussion about it, in other words?

The Witness: No, sir.

Q. As far as they were concerned, they gave the whole sum to you so that you would use your influence to help them, isn't that it?

A. Naturally.

Q. So the point is that you had influence and you were going to use it in their behalf and that is why they paid you?

A. They paid me to help me carry on the organization work which naturally created influence because I had been active in politics for thirty years.

Q. And it was this influence which you had which you were to use in their behalf?

A. If you want to call it influence, I don't know whether it is influence or not.

Q. Well, didn't Weloff or someone for him bring the money to you every week, appropriately $750 or $800 up until some time in 1935?

A. Not every week, I don't think.

Q. Well, when he missed a week he made it up the next week, didn't he?

[fol. 1115-76] A. No, I think there was a lot of times they didn't pay anything.

Q. Was that when there were arrests?

A. Usually when there were arrests, yes.

Q. They stopped paying?

A. And when they weren't doing business.

Q. Well, now, in the spring of 1935 didn't Weloff go to you and tell you that he and towhey had split up and Towhey had taken away all the business?

A. I never knew anything about that.

Q. Did you call Towhey to your office and tell him you woul like to see him get back with Weloff?

A. No, sir.

Q. Do you remember that in 1935 before the syndicate was formed the numbers banks had a price war?

A. No, I didn't know anything about it.

Q. You know that just before the syndicate was formed the police were very active and made a lot of arrests in the numbers business?

A. Only by reading in the papers.

Q. You didn't get your $800 a week during those weeks, did you?

A. No, sir.

Q. Why not?

A. There was police activity.

Q. That's it. When the police were active and were molesting these numbers men they didn't pay you, did they?

A. If they didn't operate, they didn't pay.

Q. But even if they were operating when the arrests were being made in large numbers they didn't pay you, did they?

A. I don't remember about that. I don't think they did.

Q. Well, now didn't Weloff and Towhey come to you and tell you that they had formed a numbers syndicate?

[fol. 1115-77] A. I think Mr. Weloff told me.

Q. Didn't they come together?

A. They may have, I am not sure about that.

Q. Didn't they tell you that they had settled their differences and from then on you would start to get your money again?

A. I don't remember anything about the statement regarding the settling of differences.

Q. Well, you hadn't been receiving any money from Weloff, had you, for a period of several weeks?

A. I don't think so.

Q. Then he came to you with Towhey and he said they were going to give you some money, didn't he?

A. My recollection is he was alone.

Q. All right. Assuming he was alone, what did he say to you about the money he was going to give you?

A. He said they had gotten together, I don't think he used the word "syndicate", and they were going to pay $1200 a week.

Q. For what?

A. To help me along with my political work.

Q. Well, now, didn't you undertake to see that the arrests stopped once they started to give you the $1200 a week?

A. No, sir.

Q. Did Weloff and Towhey continue to give you that $1200 a week up until some time in 1937?

A. Yes, sir.

Q. What did they give it to you for during these years 1935, six and seven?

A. To help me carry on my political work.

Q. And what were you to do in return?

A. Elect candidates that were favorable to my principles, the principles I advocated.

[fol. 1115-78] Q. You mean the principle of allowing the numbers game to operate?

A. Amusements of that sort, yes, sir.

Q. In violation of the law?

A. Well, I shouldn't say that.

Q. Well, it was violating the law, wasn't it, this numbers game?

A. I guess it was. They had been arrested, convicted.

Q. And you advocated the principle of letting this game operate even though it violated the law?

* * * * * * * —

A. I thought it was popular and that the people of Atlantic City wanted it.

Q. Well, now——

A. They had a vote on something; I think it carried 7 to 1.

* * * * * * *

By the Court:

Q. Mr. Johnson, were your political activities that you described during these three years financed entirely out of these funds?

A. Yes, sir.

Q. In other words, did the money that you received from the numbers business completely finance all of your political activities and organizations except at election times, when you got campaign funds, as you said?

A. Yes, sir.

Q. Then it was a pretty serious thing to you, wasn't it, when these payments stopped on November 1, 1937?

[fol. 1115-79] A. Not necessarily.

Q. A serious threat to your organization, wasn't it?

A. Not necessarily, no, sir.

Q. You mean you thought you could make that up from some other place, that money that you had been using to keep your organization going?

A. I had accumulated some money.

Q. You thought you had sufficient reserves to carry on?

A. Yes, sir.

By Mr. Burns:

• • • • • • •

Q. Well, what happened in 1937 when this money stopped, why did it stop coming to you?

A. I don't know, sir.

Q. It just stopped?

A. Yes, sir.

Q. Didn't you try to find out how come you were not going to get $1200 a week any more?

A. No, sir.

Q. Now, you say that you gave some of this money to newspaper men?

A. Yes, sir.

Q. Was that money given to those newspaper men so that they would take an attitude of tolerance in the administration of the affairs of Atlantic City, and that these newspapers would not create the situation where they would be demanding the numbers be closed and things of that sort, and that they would not be advocating reform and stirring up things in Atlantic City?

A. I gave it to them with the understanding that they would boost my policies and editorially boost me politically, [fol. 1115-80] and give notice to meetings we were running throughout the County at different times, particularly during election time.

• • • • • • •

Q. Did you give money to these newspapers to influence their editorial policies?

A. Yes, sir.

Q. That they should favor the candidates which you sponsored?

A. Favor the policies and candidates too.

Q. Wasn't that a violation of the election law?

Mr. Winne: I object, if the Court please. It is a legal question. I submit it is not a violation. He submits it is. It is a legal question.

The Court: He may ask the witness whether he believes it to be or not.

Mr. Winne: I suppose he can ask him if he thought it was.

The Court: Yes, it is a question of intent, of course, in this case.

Did you know or have any reason to feel that was a violation of the election law, Mr. Johnson?

The Witness: No, sir. No, your Honor.

Q. Will you answer this question, please? Did you give the money to the newspapers in order that these papers should not create a situation where they were demanding [fol. 1115-81] the numbers be closed, and things of that sort, and would not advocate reform?

A. No, sir.

Q. Did Weloff ever say to you that he knew you had returned as taxable income that part of this numbers money which was not disbursed for the purposes for which it was given?

A. Will you please read that to me?

Q. (Question read.)

A. I don't think so.

Q. Did you receive any money during 1935, six and seven from the horse rooms in Atlantic City?

A. No, sir.

Q. Did you receive any money during 1935, 1936 and 1937 from Samuel Camarota?

A. No, sir.

Q. During 1935, and 1936 and 1937 did you receive any money from the bingo game in Atlantic City?

A. No, sir.

Q. Did you tell your secretary, Maie Paxson, that these

memoranda you gave her were related to money that you had received from the numbers game?

A. No, sir.

Q. Why not?

A. I did not consider it any of her business.

Q. Why didn't you tell her what it was?

A. Why should I tell her.

Q. Well, she kept a record of your income from the Mays Landing Record, didn't she?

A. Yes.

Q. She kept a record of your money from the American Oil Company, didn't she?

A. Yes.

[fol. 1115-82] Q. She kept a record of your checks for County Treasurer, didn't she?

A. Yes.

Q. And she kept some of the records of the money you expended for political purposes, didn't she?

A. Yes.

Q. Then why didn't you tell her where this other money came from?

A. Because I did not want to.

Q. Why not?

A. Because it was a personal matter with me.

Q. Weren't the others personal matters to you?

A. But they were paid by check and a matter of public record.

Q. Was it because you did not want her to know that you were getting money for protecting this numbers game?

A. No, sir.

Q. Bewley made up your income tax returns, didn't he?

A. Yes.

Q. And each year, particularly those three years 1935, 1936 and 1937 when the income tax returns were being prepared for those years, you sat down with him and with Miss Paxson and went over the data from which he was to make up the return, didn't you?

A. Yes, that is right.

Q. And you discussed with him money that you had received from the Mays Landing Record, the American Oil Company and as County Treasurer, didn't you?

A. I do not know that I discussed it with him. I just gave him the amounts.

Q. And the amounts; you gave him showed what source the income came from, didn't it?

A. Yes.

Q. And you also discussed some interest that you had [fol. 1115-83] received and some dividends you had received from various sources, didn't you?

A. Just gave him the figures.

Q. And you told him what it represented?

A. It was written down.

Q. And it said "Interest or dividends," didn't it?

A. Interest or whatever it was.

Q. And you claimed a lot of expenses and deductions, didn't you?

A. Whatever they were.

Q. Let us take the year 1936. Your income tax return, Exhibit G-2, shows dividends of $260.16. That is from information that you gave to Mr. Bewley, is it not?

A. No.

Q. And it shows as deductions interest paid, bad debts, contributions, and other deductions authorized by law in various amounts. All of those items were items that you or Miss Paxson, in your presence, gave to Mr. Bewley. Is that right?

A. Yes.

Q. And attached to the return are two pages of itemized deductions which you showed to Mr. Bewley and which were deducted by him on your income tax return; is that right? (Pages shown to witness)

A. It looks all right.

Q. And yet you did not tell him what the deductions were that you used in arriving at the amount, which you stated to him were commissions; is that right?

A. No, sir; I did not.

Q. If you had told him all these other deductions to put on your income tax return, why didn't you tell him the deductions that you were claiming from this numbers money?

A. I did not think it was necessary.

Q. Why not?

[fol. 1115-84] A. Because it had been handled in cash.

Q. Did you tell Bewley that you received $62,400 in 1936, from the numbers game?

A. No, sir.

Q. Yet you told him every other source of income that you had in that year, didn't you?

A. Yes.

By the Court:

Q. Mr. Johnson, had you made any special study of the income tax law?

A. No, sir.

Q. I suppose you retained Mr. Bewley as more or less of a tax expert to make your returns; I mean he was an accountant and you got him because you thought he knew how to do it?

A. Yes, I used him one night.

Q. Didn't you do it every year?

A. One night every year.

Q. You got him to make it up?

A. Yes.

Q. Did questions come up at that conference as to whether this, that or the other items were deductible under the law?

A. Not that I recall, your Honor.

Q. You do not recall that?

A. No.

Q. Didn't it occur to you that perhaps expenses of buying coal for individuals in Atlantic City might not be deductible under the income tax law, or expenditures of that kind which you say you made out of these funds? Did you give any thought as to whether they were deductible or not?

[fol. 1115-85] A. No, I did not.

Q. You never gave any thought to it?

A. No.

Q. And you did not think of consulting Mr. Bewley as to whether they would be allowed in an income tax deduction?

A. No, your Honor, but I did not think that the receipts for the expenditures that I have claiming deductions, for instance for coal——

Q. Well, I mentioned coal. Did any of the other deductions whatever they were for, did you ever give any thought to whether the income tax laws would permit you to deduct them?

A. No, I never gave it any thought.

Q. You never gave any thought to it?

A. No.

Q. You knew that some deductions were not allowable?

A. Yes.

Q. You knew that you could not deduct your own personal expenses, for instance. You could not deduct charitable contributions above a certain amount. I mean, you knew there was a limit to the deductions that the law granted. You knew that?

A. Yes.

The Court: All right.

By Mr. Burns:

Q. Let me show you your 1936 return in which you claimed a deduction for taxes on gasoline of $408.48.

A. Yes.

Q. Now you had kept a pretty accurate record of the number of gallons of gasoline that were used during the [fol. 1115-86] year, in order that you could claim that deduction for taxes, didn't you?

A. It would seem so, yes.

Q. And with a tax rate of approximately three cents a gallon, that means you bought about 14,000 gallons of gasoline, that year, and you kept an accurate record of all that gasoline, didn't you?

A. The drivers of the cars on these various charitable and these other things kept track or it.

Q. You say that you appropriated some of this money that was given to you for your own use. Is that right?

A. Yes.

Q. Do you mean you used that for your personal living expenses?

A. Yes.

Q. All of it?

A. Not all of it.

Q. Most of it?

A. Well, I do not remember.

* * * * * * *

The Court: Well, I do not know that it is clear.

Q. In the year 1935 you have admitted that you received from the numbers game approximately $45,700; is that right?

A. Yes.

Q. And on your income tax return for 1935, you reported commissions of $23,995.59; is that right? I am reading from the return.

A. Yes.

Q. I want you to tell us for what purposes and how you spent the 22,000 dollars that you did not report.

* * * * * * *

[fol. 1115-87] A. For various things. Carrying on the organization, holding meetings.

Q. Give us a few details as to who you gave it to, and the amount.

A. I cannot do that. I remember one payment of $2500 to the Atlantic City News during that year.

Q. Don't you have any receipts for that year 1935?

A. Yes.

Q. Who has them?

A. They are in the office in Atlantic City.

Q. You mean they are there now?

A. I think so.

Q. Or are they in court?

A. No, they are not in court.

Q. Outside of the $2500, can you tell us anything else that you spent this $22,000 for?

A. I think the precinct men of the Fourth Ward. There were twenty-three precinct men, and they averaged about $200 to a precinct man to carry on election work in my interest.

Q. Have you got receipts for that?

A. No, sir.

Q. Did they get any money in 1936 in your interest?

A. That was paid out of the $1500 contribution I think.

Q. If there were 23 precincts at $200 each that would be $4600. How could that be paid out of $1500?

A. We didn't use so much money that year.

Q. You spent $4600 for precinct captains and $2500 for the Atlantic City News. What else did you spend out of this $22,000?

A. I think Captain Weakley in the second ward.

Q. You mean police Captain Weakley?

A. Yes. He is the leader of the ward.

Q. How much did you give him?

[fol. 1115-88] A. I don't remember. It might have been five hundred; it might have been two hundred fifty.

Q. Is it your contention before this jury that your 1935, 1936 and 1937 income tax returns correctly report the taxable income and the tax due from you to the United States?

A. I do.

Q. You say to this jury that it is your opinion and your belief that those income tax returns are correct?

A. I do.

Q. And has that been your belief and opinion all along since the time you filed them?

A. Yes, sir.

Q. Did you tell anybody not to tell the government agents or the Bureau of Internal Revenue that they were giving you money from the numbers game?

A. No, sir.

Q. Have you always been willing that the men who gave you the money should tell the government that they gave it to you?

A. Yes, sir.

Q. Now, around May 27th this year you received a letter from the Bureau of Internal Revenue offering you an opportunity to explain any discrepancies which the agents believed they had found in your income tax returns. Is that not so?

A. Yes, sir.

Q. Now, if you believed that your income tax returns were correct and that you could explain any discrepancies which they found why did you not appear in answer to that letter with an attorney or accountant or anybody you chose and explain those discrepancies at that time?

A. I was under investigation by the federal Grand Jury.

Q. If you believed your income tax returns were true [fol. 1115-89] and correct what difference did it make whether you were under investigation if you hadn't committed any offense?

A. Well, I don't know. That is the reason I didn't appear, because I was under investigation.

Q. Well, if your returns were correct and you believed them to be correct and you had an accountant who prepared them, wasn't the place to explain that in the Internal Revenue office when you were offered the opportunity to explain it?

A. I said I refused to appear because I was under investigation.

Q. Or did you refuse to appear because you knew that your returns were not correct?

A. No, sir. That wasn't the reason.

Q. Now, after you failed to appear before the Internal Revenue agent on June 2, 1941, the date which the hearing

was offered you, or at any other time, you received a subpoena to appear before the Grand Jury in Camden, did you not?

A. Yes, sir.

Q. And before you entered the Grand Jury room did you confer with your attorneys?

A. Yes, sir.

. . . . . .

Redirect examination.

By Mr. Winne:

Q. Maybe you have answered it, but will you tell me why you did not return all of the money you received from Towbey and Weloff as income?

[fol. 1115-90] A. Because I spent part of it in carrying on the organization, building myself up as leader.

Q. What was your thought about the things that you spent in relation to income?

A. I thought that they were deductible.

The Court: I thought you said you never gave any thought to that. Didn't you tell me that you never gave any thought to the question whether they were deductible?

The Witness: I may have said that.

The Court: You now say that you did give some consideration as to whether the income tax law would (1561-a) permit you to deduct these things?

The Witness: Well, I do not remember about that now.

The Court: Well, what was your answer to Mr. Winne? Didn't you just say that you thought they were deductible? Didn't you say that? I thought he did.

Mr. Winne: Yes, he said he thought they were deductible. Your Honor, I think on the examination of yesterday he said the same thing. That is the reason I asked the question again.

The Court: That is right. You thought they were deductible?

The Witness: Yes.

The Court: On what did you base that thought? What [fol. 1115-91] opinion or advice or study of the law, or what did you base your thought on that they were deductible?

The Witness: Because I had spent the other money or this money in carrying on my organization, and the reason

these people came to me, as I thought, was because I was the leader.

The Court: Well, I am talking now about the deductibility under the income tax law of the expenditures that you made out of that money and as I understand it you say you reported the net amount because you thought the amount you spent out of it was deductible under the law. Am I correct in stating your view, you thought they were deductible under the income tax law—this is the income tax law; you knew you were dealing with that; you understood that?

The Witness: Yes, sir.

The Court: And I am asking you upon what you based that thought that these personal expenditures would be deductible, would be allowed as a deduction under the law.

The Witness: General information.

The Court: Did you consult anyone about it, any expert or any lawyer or anyone who might know about income tax matters?

The Witness: No, sir.

The Court: You did not?

[fol. 1115-92] The Witness: No, sir.

The Court: You never mentioned it to Mr. Bewley?

The Witness: No, sir.

The Court: When you were making up your return.

By Mr. Winne:

Q. Why didn't you pay on it, Mr. Johnson?

A. I didn't think I had to.

Q. Why; what was your reason for not thinking that you should pay a tax on the money you spent?

Mr. Burns: I think that is objectionable, what his reason was for not thinking; I mean he has answered this at several times.

Q. What, if anything, was your intention in not paying on the difference between the numbers money and the commissions?

Mr. Burns: I object to that.

The Court: I don't believe that is proper either, Mr. Winne. You are simply trying to rephrase the questions that I gave. As I understand it, I am trying to find out from this witness, and I think the jury is entitled to know, upon what information, study, or whatever it may have

been he based his thought or belief which he has expressed, that he was entitled to deduct these expenses of his organization. He apparently hasn't anything definite.

[fol. 1115-93] Mr. Winne: He apparently didn't go to anyone and get advice; that seems to be in the case. The question is why he didn't.

The Court: I think he says he didn't study the income tax law.

Mr. Winne: I think you asked if he consulted with anyone and he said no,—or Mr. Burns,—but now if there is anything that can help the Court and jury I would like the witness to say upon what he based his opinion that he didn't have to pay on the difference between the gross amount of forty or whatever it was and the amount that he returned.

The Witness: General information is the only thing I can say.

Q. What was the general information; can you help us with that?

A. In my own mind.

Q. What was it? What was it your mind had in it?

A. I thought that these expenses that I had in connection with running the organization shouldn't be paid on.

The Court: Well, Mr. Johnson, you knew that personal expenses were not deductible, didn't you?

The Witness: Yes, sir.

The Court: And don't you make a distinction here as I gather it between campaigns and the candidates and the regular Republican activities, and your personal organization, building yourself up as leader?

[fol. 1115-94] The Witness: That's right.

The Court: Now, did it not occur to you that these might be personal expenses that wouldn't be deductible, building yourself up as a leader?

The Witness: No, I thought they were deductible.

The Court: Did you ever consider under what heading of deduction they would properly come?

The Witness: No, sir.

The Court: You never consulted anybody about it?

The Witness: No, sir.

The Court: And you cannot tell us any source of information upon which you formed that belief?

The Witness: Except that the thought in my mind was that these people wouldn't have come to me with this income unless I was the leader.

The Court: Well, I don't believe we are talking about the same thing, Mr. Johnson. I am not talking about how the money came into you, I am asking you, assuming the money did come in which you said it did, your basis for believing, as I understand you did—you say you did—that you had the right to deduct expenses that you made out of it and report only the net amount for income tax. Now, the question I am asking you about is the basis for your belief that these expenses were deductible under the law [fol. 1115-95] and you could take them off and report only the net amount.

The Witness: That was my own belief.

The Court: And it wasn't based on any information, was it?

The Witness: No examination of the income tax law.

The Court: And no consultation with anybody?

The Witness: No, sir.

The Court: No report or newspaper account or anything you may have read or heard anybody say?

The Witness: Not that I remember.

The Court: You never heard of any case like that where such expenses were deductible?

The Witness: Not at that time.

The Court: All right.

By Mr. Winne:

Q. It was just the product of your own reasoning, Mr. Johnson?

A. Yes, sir.

Q. You considered them business expenses?

The Court: Well, now, he hasn't said so at all. That is a leading question.

[fols. 1115-96–1772] Mr. Winne: Yes, the question is leading, if your Honor please.

The Court: He hasn't said that; he says he considered them the expenses of maintaining his personal organization, building himself up as leader, as I understand him. Maybe I am misquoting him.

Mr. Winne: The most significant thing he said, I think—

Mr. Burns: I object to that. We don't care what he thought was significant.

The Court: The objection is sustained.

Mr. Winne: That is all, Mr. Johnson.

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[fol. 1773] WILLIAM B. MACDONALD, called and sworn for the Government in rebuttal, testified as follows:

Direct examination.

By Mr. Burns:

Q. Mr. MacDonald, what is your present occupation?

[fols. 1774-1775] A. Official Court Reporter for the Second Judicial District for the State of New Jersey.

• • • • • • •

Q. Did you report the proceedings of the Grand Jury for the United States District Court of the District of New Jersey in Camden on June 10, 1941?

A. I did.

Q. Did you take down stenographically the testimony of Maie Paxson?

A. I did.

• • • • • • •

[fols. 1776-1777] Q. Will you tell us whether on G-5b for identification you made stenographic notes at the time that Maie Paxson testified before the Grand Jury?

A. I did.

• • • • • • •

[fol. 1778] (G-5a and G-5b for identification received in evidence.)

Direct examination (continued).

By Mr. Burns:

Q. On the same day did you take stenographic notes of the testimony of John M. Bewley?

A. I did.

• • • • • • •

Q. On G-4b did you record the questions that were asked of John M. Bewley on June 10, 1941 and the answers that he gave before the Grand Jury?

[fol. 1779] A. I did.

. . . . . .

Mr. Burns: I offer G-4a and G-4b for identification in evidence.

The Court: Admitted in evidence.

. . . . . .

[fol. 1780] (After recess.)

Mr. Burns: I would like to read from exhibit G-5, the Grand Jury testimony of Maie Paxson.

(Mr. Burns read as follows:)

Mr. Burns: Starting page 4:

"Q. Did you keep any records for Mr. Johnson in all these years that you acted for him, did you keep any records that would show the amount of income he was receiving in the course of a year?

"A. Not his complete income. All I would have was my memorandum he might send to me for my record, or anything that came naturally to my hands first.

"Q. You did keep a record of that?

"A. Yes, of everything.

"Q. Of those checks that passed through your hands?

"A. Yes, of everything.

"Q. Did he send you any other memorandum as to income that he received?

"A. Once in a while I would get a little slip, for instance, declare an income tax. That was on the slip, whatever amount, and we keep an income tax envelope, a manila envelope, in the drawer, for anything pertaining to income and that is kept in it, so at the time we make up the income tax we have whatever record we need.

[fol. 1781] "Q. Let us go into this memorandum he would send. Would there be a date and amount on the slip?

"A. That is correct.

"Q. Would there be any indication of the source of that income?

"A. No.

"Q. Do you recall what some of those amounts were, approximately?

"A. No, I really do not.

"Q. What the range would be?

"A. No, I really do not remember, Mr. Frank.

"Q. Would it be something like $2000 or $5000, $200?

"A. I do not know why there is just one amount I happen to remember that for, I think, $1700. I do not know why that comes to me but I would have to bring up the slips to truthfully tell you what came.

"Q. You keep these slips for Mr. Johnson, during the course of the year, is that correct?

"A. Anything that he sends to me, I keep in this envelope, so at the time when Mr. Bewley would make it up we have any memorandum at all pertaining to it."

Questions by Mr. Burns:

"Q. Did you receive these memoranda of income from Mr. Johnson regularly?

Q. Oh, no, Mr. Burns. I mean maybe once or twice in a [fol. 1782] year I might get a slip up.

"Q. What I mean particularly is this, did he give you a slip or some kind of statement each week, showing what he had received?

"A. Oh, no; oh, no.

"Q. How often did you get these slips?

"A. As I say, maybe once, twice, maybe three times a year, maybe not that."

At the bottom of page 6, last line,—these are with reference to the 1940 return, next to the last question:

"Q. Richfield Oil Company $3540.86.

"A. See, we are no longer connected with the American Oil Company. He is now commission merchant for Richfield instead of American.

"Q. And whenever he receives commissions, you keep a record until the end of the year?

"A. Yes.

"Q. Other commissions $12,150.

"A. I would not know anything about those.

"Q. Just what did you have on that?

"A. Well, there may be a slip or two in them so as to declare in income tax, maybe $200, $700, any amount, but in 1940, this particular year I do not remember that I had any

[fol. 1783] commissions in cash. I would have to look on the work sheet to see what I had.

"Q. Is that a work sheet that you prepared?

"A. Yes; in other words, when we are preparing for Mr. Bewley, I make a work sheet up and I explain everything on it, and if I have any memorandums they are clipped on the work sheet, so Mr. Johnson can explain when he is making up his income, so that he knows what amount it is and when he sent it to me.

"Q. For the year 1940, this amount of $12,150, do you recall whether that is made up of several items or just one or two?

"A. No, I do not. That is from several of them, I imagine, because I sit there when it is made up and I hear Mr. Johnson say to Mr. Bewley, 'Declare. I have a commission here of $5000,' or commission of this, that, or the other.

"Q. Take this last return for 1940. You say that Mr. Bewley and Mr. Johnson and you were together at the time Mr. Bewley was going over the figures?

"A. That is right.

"Q. When Mr. Johnson was telling Mr. Bewley?

"A. I pay no particular attention, Mr. Burns, for the reason when I am finished giving Mr. Bewley whatever in-[fol. 1784] formation I have, there is another girl—she is also there, giving information—who works in the law office where they handle anything he might have had in the line of real estate and things of that sort."

Question,—down a little further on the page:

"Q. This item of commissions of $12,150, can you tell whether you had slips amounting to that total?

"A. No, I did not.

"Q. Mr. Johnson gave those figures to Mr. Bewley and you happened to be present?

"A. Right.

"Q. And you did not pay any particular attention to the amounts mentioned?

"A. No, that is right.

"Q. Did Mr. Johnson mention what source he received the commissions from?

"A. I would not know."

* * * * * * *

[fols. 1785-1788] "Q. Take the year 1939. We will go backwards. We have in that return other commissions $21,450. Is that a figure which you made up from slips you got or something Mr. Johnson gave Mr. Bewley?

"A. I never had anything to do with these other commission accounts other than if I had a slip or two, but that never amounted to anything like this.

"Q. You have no knowledge——"

. . . . . .

[fol. 1789] "Q. Except you happened to be present when the figures were given to Mr. Bewley?

"A. That is right.

"Q. You did not know what they were?

"A. That is right. I had no idea.

"Q. Is the same true for every year from 1934 to 1940 inclusive?

"A. That is right."

Mr. Burns: Page 2, halfway down (reading):

"Q. On this 1940 return"—I am reading from Exhibit G-4, page 2:

"Q. On this 1940 return there is an item of other commissions $12,150. From what information did you prepare that figure?

"A. That was from Mr. Johnson's own statement that he had received that amount as other commissions.

"Q. Did he give you that as a total figure or did he give you smaller amounts which you added up?

"A. No, he gave me that as a total figure.

"Q. Did he show you any sort of record or memorandum as a basis for the figure?

"A. Not for that figure, no, sir.

"Q. In other words, he just gave you an oral statement that he had other commisssions of $12,150?

"A. That is right."

[fol. 1790] Mr. Burns: Now, on page 3 (reading):

"Q. For the year 1939 did you prepare the income tax return?

"A. Yes, sir.

"Q. That reports other commissions of $21,450. What information did you have as to that figure?

"A. The same information as 1940. He told me a lump sum of other commissions.

"Q. He gave you no breakdown of the figure?

"A. No.

"Q. For the year 1938 did you prepare this return?

"A. Yes, sir.

"Q. That reports other commissions of $28,431.67. From what information did you get that figure?

"A. That is the same information as the other two years. It was a lump sum that he had given me.

"Q. I show you 1937 return. Did you prepare that?

"A. Yes, sir.

"Q. That reports other commissions of $30,189.99. From what source did you obtain those figures?

"A. From the same source the other three years.

"Q. I show you the 1936 return. Did you prepare that?

"A. Yes, sir.

"Q. That reports other commissions of $26,441.08. From what source did you get that figure?

"A. That was the same proposition as the other years. He gave that to me in one lump figure.

[fol. 1791-1873] "Q. I show you the 1935 return and ask you if you prepared that?

"A. I did.

"Q. The commissions of $23,245.59, from where did you get that information?

"A. It was the same as the other years."

Mr Burns: Now, reading from page 5:

"For the years 1935 to 1940 inclusive, these figures that you put on the returns, for other commissions, were a total figure each year given to you by Mr. Johnson?

"A. That is right."

[fol. 1874] The Court: The Court will recess until 7:30 P. M.

(A recess was here taken until 7:30 P. M.)

[fols. 1875-1911] Evening Session

CLOSING ADDRESS TO THE JURY IN BEHALF OF THE GOVERNMENT

* * * * * * *

[fol. 1912] I asked him, "Did you get the money in 1938?" and he said, "Yes". Well, of course, then a lot of little things happened. They didn't like that because naturally you say, "Well, I don't understand that, Mr. Johnson." I wish you could have asked him questions then. You say, "Mr. Johnson, you say that suddenly November 1st, 1937 you stopped getting the $1200 from numbers; then in 1938 you started to get it again? How come?" You don't get it, you don't get it because it isn't the truth. That is what cross examination is for.

So then we went beyond that. We said, "Who did you get it from?" He said, "I claim my privilege against self-incrimination. I violated the income tax law in 1938; I don't want to tell you about that. I am having enough trouble with 1935, six and seven." If he could have claimed his privilege on the stand here with respect to 1935, six and seven he would have done it. He would claim anything that is necessary to get him out of any predicament he is in. [fol. 1913] Well, now, ladies and gentlemen, if he got that numbers money in 1938 who did he get it from? He must have got it from Jack Southern. Maybe he got it from Inspector Ferretti, but he admits he got it. Well, then, if he got it he got it during the last two months of 1937. They didn't say anything about that to you because they were trapped. No need of them talking about it. It is for me to point that out to you.

Now, ladies and gentlemen, can you believe that man told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from on the ground it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground it would incriminate him, well, then, I just don't get it.

He said he reported it on his returns as commissions so I asked him, "What were the commissions for 1938?" He

says, "I refuse to answer on the ground that it might incriminate me." Well, now, ladies and gentlemen, his whole [fol. 1914] defense in this case is that he had a certain system of keeping track of his money and that he put the balance on his return for commissions and that he correctly reported it. If that is the truth there wasn't any reason why he couldn't answer that question for 1938, but he wasn't prepared. They came into court thinking that they could limit the proof to those three years so he wasn't prepared to answer it. Just like the 1935 when I said to him "you claim that you spent some money in 1935 and you got down to this amount of other commissions on your return. Tell us what you spent it for." He couldn't; he couldn't tell you any of those things without a memorandum. Now, if that defense were based on facts it would have been available and prepared long, long before the trial of this case, so what happened? When Mr. Johnson took the witness stand he was asked by his counsel to tell what his expenses were. He said, "I will have to look at the memorandum." He took it out of his pocket. I said, "Well, when was that prepared?" Of course if he had filed honest returns he would have had three memorandums, one for each year. He would have said, "This was prepared in March of 1935; this was prepared in March of 1936; and [fols. 1915-1942] this was prepared in March of 1937." But that isn't what he said. He said, "This was just prepared this morning."

Now, if we had proven $100,000 he would have had a sheet for $100,000. If we proved $200,000 he would have had a sheet for $200,000. He was prepared to substantiate whatever he thought he had to. Now, when you come down to 1937 he leaves himself wide open because he decided that we only established that he got $50,000 instead of $62,000. so he didn't try to explain the last twelve. Well, right there he is guilty. You don't have to do any more. He only accounted for $50,000 out of the $62,000 and he was still getting the money in 1938. That practice was continuous. You don't have to do any more.

. . . . . .

[fols. 1943-1948] The Court: I think the thing for me to do on all of this, gentlemen, is for you to submit to me any points involving erroneous suggestions as to the facts that you feel the evidence does not warrant and I will give a

very careful and clear instruction to the jury that after all it is only an argument, that you may have gone beyond the bounds.

Mr. Winne: I would want anything I might have said that was not justified by the evidence corrected.

The Court: Mr. Burns also, and rather than go over it piecemeal, instead of having you make your speeches over again, I will ask the jury to disregard what you said.

* * * * * * *

[fol. 1949] You can make your statement before my charge, or I will tell the jury that counsel have asked me to state that they feel they should not have said certain things which are outside of the case. It certainly would be unfortunate, because of some vehemence, something was in here that should not be. After all, that is not going to win or lose the case because something was said like that. Suppose we leave it that way with all your exceptions and my rulings on that and perhaps we can reconsider all of them and each of you can go over all of them.

Mr. Mehler: I think that would be a happy situation. I will be glad to abide by your Honor's wishes.

The Court: We will have time to do that tomorrow [fol. 1949a] morning.

(Adjournment was here taken to July 25, 1941, at 10 a. m.)

[fol. 1950] July 25, 1941.

Case continued.

Appearances as before.

(No jury present.)

Mr. Winne: If the Court please, at the conclusion of yesterday's proceedings, Mr. Mehler stated for the record certain objections that the defense had to the comment and the summation of the government's attorney, and as to those which were stated in the record last night I will not comment because I guess everyone has the record now, and I don't think it is necessary to go over those stated last night again.

The Court: I asked counsel at the termination of those proceedings whether they would not consider both summations and perhaps they might feel that in the heat of oratory they might have gone beyond something and would

want to withdraw or modify what they said on either side this morning.

Mr. Winne: My thought about that, if the Court please, is this, if I said anything in my summation that is contrary to the proven evidence in the case and it can be pointed out [fols. 1951-1962] I would ask the Court to charge the jury to disregard it. If I said anything in the nature of argument that the Court thinks was beyond the realm of propriety I would consent that the Court state to the jury that that was said in the heat of argument and it should not have been said and they should disregard it; and I would urge the Court, so far as those things we are now about to point out that the government said, and I am referring now only to such things as we think are outside of the evidence or are inflammatory and unfair remarks on the evidence, that as to those things the Court do that same thing to the jury. I ask the Court to treat me exactly as the Court treats the government counsel.

The Court: I think that is right.

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[fol. 1963] Mr. Winne: I am now discussing Mr. Burns' comment on the fact that the defendant when on the stand pleaded his constitutional privilege. On page 1912 Mr. Burns makes this comment on the fact that the defendant had said before he pleaded his privilege that he did receive certain moneys in 1938. "He said, 'I claim my privilege against self-incrimination. I violated the income tax law in 1938; I don't want to tell you about that. I am having enough trouble with 1935, six and seven.' If he could have claimed his privilege on the stand here with respect to 1935, six and seven he would have done it. He would claim anything that is necessary to get him out of any predicament he is in."

[fol. 1964] I say, of course, that when he quotes, "I violated the income tax law in 1938", it is an entire misconception of what the claim of privilege is. The claim of privilege, of course, we all understand, is that the testimony if given would have a tendency to incriminate him. Not that it would prove him guilty, not that by claiming the privilege he admits his guilt, but that merely by claiming the privilege he desires to be relieved from giving any testimony which might have a tendency to incriminate him.

The Court: I think that is right. The quotation is not accurate. The defendant didn't say what Mr. Burns quotes him as having said.

Mr. Burns: It is not intended to be an exact quotation.

The Court: I realize that.

Mr. Burns: In the argument they are permitted to argue that government witnesses are trying to do certain things, and whether they phrase it in the third person, he said this or he testified this or whether they try to make it more emphatic by putting it in the first person, it is just a question of argument, and no one would think for one minute they were quoting testimony. It was not any intention to [fol. 1965] quote exactly, and I think neither the jury nor anyone thinks it was.

The Court: I agree it was not any intention. I think, however, as it appears, it looks as though you were purporting to quote his testimony.

Mr. Burns: Well, of course, I disagree with that interpretation.

The Court: Here it is in quotation marks.

Mr. Burns: I didn't say "quote" when I was talking.

The Court: No, but you used the first person.

Mr. Burns: Yes, and I say that is proper when we are discussing the evidence in the case. I say here is his position, I did this, I did that, and naturally he didn't say that.

The Court: You didn't say this was his position. You said, "He said", you didn't say, "He said in effect", or, "We may assume what he really said was."

I think perhaps we had better indicate to the jury that you were not quoting the witness in that case.

It seems to me further that,—isn't that introducing to the jury a question of whether he is guilty of some other crime at some other time?

[fols. 1966-1971] He is not being charged with any 1938 tax.

Mr. Burns: It is a question of his good faith and his credibility, and the answers he has already given on similar questions. That is the purpose for which the questions were permitted.

The Court: I think I probably should indicate to the jury that that is the full extent of it.

* * * * * * *

[fol. 1972] The Court: Before we go into that, let me ask: There were a number of matters referred to last evening, when we were all pretty tired, by Mr. Mehler; I ruled on some of them, all of which rulings I indicated I would reconsider. Now, have you mentioned to me now all the points you desire to refer to?

Mr. Winne: We withdraw whatever was said last night, [fols. 1973-2071] is that right? I think that is the fair thing to do.

Mr. Mehler: That's right.

The Court: I want you to tell me——

Mr. Winne: I think the only fair thing to do is to forget everything that happened last night and start this morning.

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[fols. 2072-2073] CHARGE OF THE COURT

The Court: Members of the jury, we have now at last come to the point where it becomes your duty to perform your function in this case, and my duty to perform my particular function in this case, it being my duty to instruct you upon the principles of law which are applicable to the facts of this case and which are to be applied by you in considering it, and your duty to consider the case in the light of the law that is applicable, and to decide it.

[fol. 2074] As to some of you, this may be the first case which you have considered as jurors, and it would be proper for me to point out, what no doubt many or all of you may know, that your deliberations are to take place under the chairmanship of your foreman, Mr. Showell, who will preside over your considerations, and that your determination of the case must be unanimous, that is, you must all agree upon whatever verdict you render.

Now, it is for you to consider the case from your own knowledge and recollection of the testimony, and exhibits and the evidence which is before you. It is not what I may say to you with regard to the evidence, if I refer to any of it, as to my recollection, that controls you, or it is not what counsel may have said to you in their addresses yesterday with regard to the evidence or their recollection of it. You are not bound by what they said and you are not to follow what they said as to the evidence if you conclude from your

own recollection that they were in error. Counsel, of course, each summed up to you from the standpoint of his own side, Mr. Winne presenting the view which the defendant would have you adopt, and Mr. Burns that of the Government. Both of them may have made statements which in the heat of their argument they might afterwards prefer not to have made, and they may have made statements of fact in the case or of evidence, which are not borne out. In fact, they have called my attention to certain statements which were made and which I think I ought to call to your attention in order that you may not be misled by them. Mr. Winne has called my attention to certain statements which Mr. Burns made in his address, and I will comment on one or two of them, in order that your consideration of the case may not be influenced in any way by matters which you should not consider.

Mr. Burns referred to the fact that a person who might have been a witness, Anthony P. Miller, was not called by the defendant. The witness was, of course, available to the Government and was not called by the Government, and [fol. 2075] I do not believe that you should consider or be influenced or draw any inference against the defendant from the fact that the defendant did not call Miller as a witness.

Mr. Burns also referred to the expense account, or a report filed by the Republican County Committee Treasurer, Mr. Whitman, I think, for a period which began in 1937 and terminated perhaps towards the end of 1938. I admitted that into evidence in so far as it related to the year 1937, since it was clear that you could not distinguish between the two years in this particular report. Some argument was made by Mr. Burns that the amount of expenditures shown in that report for 1938 might indicate something to you. You ought not to consider anything about 1938 with regard to that report.

Mr. Burns also referred to the fact that Mr. Johnson in cross-examination when asked with regard to whom he received numbers moneys from in 1938, claimed his constitutional privilege of not being required to answer a question which he felt might tend to incriminate him. Now, that may only be considered by you in testing his credibility as to the answers which he did give and his good faith in the matter. We are not trying Mr. Johnson for anything that

he did in 1938, that is not before you, that is an entirely different matter concern with which you or I have not any concern whatever. We are only considering in this case the years 1935, 1936 and 1937. In so far as any suggestion was made by Mr. Burns that that might be considered for any other purpose, you should disregard it.

Mr. Burns also said that there was some question raised by Mr. Winne in cross-examination of some witness as to whether Ralph Gold did not get $50, or $50 a week. Mr. Winne says now that he believes that was not a real question but rather a hypothetical question and that there was not any testimony that Ralph Gold or any other policeman was given any money. That is for you to remember. My recollection is that there was no such testimony, at least I do not recall it, but that again, as I have said before, is a [fol. 2076] matter for you to take your own recollection of and not what either counsel might say as to what the testimony was.

Mr. Burns also, I think, said something to the effect that if the defendant took money from the numbers business and permitted it to operate, it is a fair inference for you to draw that he took money from other illegal enterprises which operated in Atlantic City, horserace rooms, bingo games, and so forth. There is not any evidence that he did take such money and that is not a question before you. The Government is not charging that he did, or charging him with any income tax on that, so that is an issue, that is not in this case and is not anything for you to consider.

The defendant called certain character witnesses, you will remember, who testified as to the reputation of the defendant for truth and veracity and only as to that particular trait of character. I do not believe that it is proper for you to draw any inference from the fact that they were not asked as to any other trait of character. All that the defendant sought to prove by them was the one trait, namely, truth and veracity, and in so far as Mr. Burns suggested you might draw some other inference from that, I instruct you to disregard his suggestion.

Finally, Mr. Burns in summation, in a rather eloquent way, suggested that it would be a proper thing for you to consider the position of this defendant in the Republican Party and that it would be for the interest of the County and of the Republican Party to purge themselves of such

an individual, or words to that effect. You will recall what it was. Of course, that was an appeal, as counsel often make in a case like this, and really has nothing to do with this case. Many of you are members of the Republican Party, as is the defendant, but you are not here to purge the Republican Party or any other party. That is not the question that is before us in this case, and you are not to consider that one way or the other any more than you should give any consideration or in your own minds give any weight to the fact that you are members of the same [fol. 2077] party as this defendant, that you may have been active in the same political party in which he in his own county is active. He is charged here with evading income taxes, and that is a crime regardless of party and it is a crime which, if committed, should be—well, it is a crime which Congress has said must be stamped out and anyone who is found guilty of it must be convicted of that crime. That is your duty regardless of any question as to his position, public or private.

Mr. Winne made an address to you also, and there is some point there, in his address which I think we ought to caution you about. He referred at one place to the fact that repeated questions had been asked of the defendant, I think, as to whether he had received money from bingo games and other games, and he said that the Court had overruled those questions. It will be for your recollection, but my recollection is that the Court did not overrule those questions but they were permitted to be answered and they were answered.

Also he referred to the fact that the Court struck out the use of the word, or refused to permit the use of the word "protection" in various cases. When I refused that I refused to permit counsel to use it in a question. I wanted the witness to say what the money was for and not to permit counsel to put words in the witness' mouth, but there was ample testimony, quite a lot of testimony from these persons in the numbers business that they gave the money, as I recall it, for protection. Of course, there again my recollection may be in error. That is for you to say, but certainly the Court did not rule that the word "protestion" was stricken out and could not be considered in this case.

Mr. Winne said something to the effect that he felt that Mr. Johnson was rushed to trial in this case. There is not

any evidence that Mr. Johnson was rushed to trial. Mr. Johnson has been given a reasonably prompt and speedy trial, which is what the Constitution of the United States [fol. 2078] assures him, and there is no complaint or any point to be made of the fact that he is being tried at this time.

There was some suggestion of Mr. Winne that there was an element of fear introduced into this case when you, members of the jury, were empaneled. I do not think there was any such element and I do not think you should consider there was any such element. Certainly you all indicated to me when I examined you, that you had no such feeling in your mind when you entered into the jurybox.

Mr. Winne said also that he believed that one of the numbers men, John Malia, testified that he did not pay for the privilege of operating. Mr. Burns called attention to the fact that that testimony was as to the period of 1933 before he began to pay. I do not understand there is any controversy about that now, but it is for you again to recall just what his testimony was and not take Mr. Winne's or Mr. Burns' word for it.

Mr. Winne also made some argument of the fact that Mr. Burns in his opening said he would show you that dummies were employed by this syndicate to be arrested, and he said that he did not prove that. That was hardly fair, because as a matter of fact, Mr. Burns offered to prove it and I ruled that under the circumstances of this case, in view of the other evidence, it was not competent and proper to be admitted, and so I did not admit the evidence, but he offered to prove it and it is not fair for Mr. Winne to say that he did not prove what he said he was going to prove, when he tried to and offered to do so.

Then there was some suggestion of Mr. Winne that Benny Ray testified there were only one or two arrests in 1935 and perhaps only one in 1937, whereas the police records which are in evidence indicated that there were 50 or 60 arrests in the early part of 1935 and there were 50 or 60 in the latter part of 1937. I believe if you examine Mr. Ray's testimony it may be that he was referring to the latter part of 1935 and the early part of 1937. That, however, is a matter for you.

[fol. 2079] Finally, Mr. Burns objects to Mr. Winne's having made an argument to you that the tax which might have been saved by the arrangement alleged to have been made

between Miller and Corio with regard to the $60,000 alleged fee, was very much less than the amount the Government contends. Well, those are complicated figures and you will just have to work that out from the evidence the best way you can, not taking Mr. Winne's computations nor Mr. Burns', unless you fell that they conform to the evidence.

Both parties in this case have presented me with a large number of requests to charge you on particular points of law. These are in writing and it will be necessary for me to read them and my duty to read them. I am proposing to incorporate them in my charge to you in some kind of a logical way which may make them a little more understandable and easier to follow; there may, however, be some little duplication in view of the fact that both parties have in some cases asked me to charge on substantially the same points. You are the sole judges of the facts, the weight of the testimony, and the credibility of the witnesses; you must rely on your own recollection of the evidence and must not accept any statment by counsel or the Court of what the evidence is unless such statement coincides with your own recollection of the testimony.

The indictment contains three counts, each of which charges a similar crime. The first count charges that for the year 1935 the defendent wilfully atttempted to evade and defeat an income tax which was due and owing from him to the United States. The second and third counts allege similar offenses for the years 1936 and 1937.

The first count of the indictment charges that the defendant failed to report in his income tax return for the year 1935 $28,000 which it is alleged he received from a contract by which he participated in the profits of the Anthony P. Miller Corporation in connection with the construction of a railroad station, and $46,400 alleged to have [fol. 2080] been received for services which the defendant rendered in giving protection to a numbers game in Atlantic City. The indictment alleges that the defendant actually had a net income of $18,028.17 on which he should have paid a tax of $1,232.18, while on his income tax return he showed a net loss and no tax due.

In the second count of the indictment, the Government alleges that the defendant omitted to report $62,400 which

it alleges he received from the numbers game in that year. It alleges that he attempted to evade a tax of $19,957.30.

The third count alleges that for the year 1937 he again failed to report $62,400 received from the numbers game, and thereby attempted to evade and defeat a tax of $19,611.12.

No inference can be drawn from the fact that the defendant has been indicted. The indictment is merely the formal written accusation or pleading by which the defendant was brought to trial.

The indictment in this case is nothing more than a mere formal charge, and the fact that a Grand Jury has returned the indictment is not to be considered as the slightest evidence of the truth or correctness of any of the allegations made in the indictment, and of the truthfulness of the charge or charges contained therein. The indictment is not evidence of the defendant's guilt, and accordingly during your deliberations you are not to consider the indictment as evidence against the defendant, or permit it, in any manner to weigh against him.

The burden is on the Government to prove beyond a reasonable doubt that the crimes charged in the indictment were committed. The defendant comes into court clothed in a cloak of innocence and this presumption of innocence holds good until displaced by proof of guilt beyond a reasonable doubt.

A reasonable doubt does not mean a fanciful doubt; nor does it mean a capricious doubt. It does not mean a doubt born of a reluctance upon the part of a jury to perform an [fol. 2081] unpleasant task, or a doubt occurring out of sympathy or sorrow for the defendant or anyone connected with him, or out of anything other than a candid consideration of the evidence presented; but it does mean a doubt which is reasonable in view of all the evidence in the case.

The defendant is not obliged to prove that he is innocent of the charges made against him, for the burden of proving his guilt is upon the Government. The Government must prove each fact and circumstance essential to the guilt of the defendant and each such fact and each such circumstance must be proved beyond a reasonable doubt before a verdict of guilty can be arrived at. This burden which the Government has of proving each and every fact material and essential to the guilt of the defendant, beyond a reason-

able doubt, never shifts, but always remains with the Government throughout the trial. So if the Government has failed to satisfy you, beyond a reasonable doubt, of the truth of each and every fact material and essential to the guilt of the defendant, either because there is no testimony supporting such element, or because you are not satisfied with the testimony in support of each such element, it is your duty to bring in a verdict of not guilty.

It is your sworn duty to commence the investigation of this case with the presumption that the defendant is innocent of the crime with which he is charged; and it is equally your duty to enter upon the consideration of each fact and circumstance in evidence having in your minds, at all times, the presumption that the defendant is innocent, applying to every such fact and circumstance the presumption of innocence; this presumption is not an idle form, but it is a fundamental and important part of the law and you should act upon this presumption throughout your consideration of the evidence, and unless it shall have been overcome by proof of guilt so strong, credible and conclusive as to convince your minds to a moral certainty and beyond a reasonable doubt that the defendant is guilty, your verdict should be not guilty.

[fol. 2082] This presumption of innocence attends the defendant throughout the trial. The burden of overcoming this presumption rests upon the Government and never shifts to the defendant, and unless the Government has overcome this presumption, your verdict should be not guilty.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the circumstances and if, after an impartial comparison and consideration of all of the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, your minds are left in such a condition you can candidly say that you have not an abiding conviction to a moral certainty of the truth of the charge or charges against the defendant, you have a reasonable doubt and you should find the defendant not guilty.

To warrant a conviction in this case the proof must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be

consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt must flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled even with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence must be adopted.

If the evidence in this case is only sufficient to create a suspicion in your minds, it is not such evidence as would justify you in rendering a verdict of guilty, no matter how unfavorable such suspicion may be, and accordingly, unless you are satisfied, beyond a reasonable doubt, by the evidence of the truth of the charges, your verdict must be not guilty.

It is not necessary for the Government to prove the guilt of the defendant beyond a possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. The reason would be that in this world of ours it [fol. 2083] is practically impossible for a person to be absolutely and completely convicted of any controverted fact which, by its nature, is not susceptible of mathematical certainty. In consequence, the law is such that in a criminal case it is enough if proof of the defendant's guilt be established beyond a reasonable doubt, and that does not mean beyond all possible doubt.

The collection of taxes is essential to the effective operation of the Government of the United States. A wilful attempt to evade and defeat a tax is a serious crime against the revenue laws, and Congress has provided that anyone so evading or defeating any tax imposed upon him is guilty of a criminal offense and may be punished.

The question of possible punishment of the defendant in the event of conviction is no concern of the jury and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence. Under your oaths as jurors you cannot allow a consideration of the punishment which may be inflicted upon the defendant if he is convicted to influence your verdict in any way. In other words, you are not concerned with the consequences of your verdict, be it what it may. You are to

decide the issues here fairly, squarely and upon the evidence and the evidence only and nothing outside the evidence

The word "evade" has been described, to avoid by artifice, elude, to practice artifice in order to elude, to avoid. Evasion means to avoid by some device or strategy or concealment or intentional withholding some fact which ought in good faith to be communicated.

There are two principal elements to the offense with which the defendant has been charged: (1) that he owed a tax, and (2) that he wilfully attempted to evade or defeat that tax.

[fol. 2084] The attempt to evade and defeat the tax must be "wilful"; that is to say, it must be made with the intent of keeping from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. This element of wilfulness is an intangible thing and it is not necessary to produce direct evidence of wilfulness. The question of wilfulness is one for you to determine from a consideration of all the circumstances.

An intent is a state of mind, and as it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of the defendant was at the time in question.

It is not necessary for the prosecution to prove the defendant attempted to evade and defeat the exact amount of the tax set forth in the indictment. It is sufficient if any substantial portion thereof was defeated or evaded.

The defendant is charged with wilfully attempting to evade or defeat an income tax claimed to be due by him for the years 1935 to 1937 inclusive. The statute applies only to such persons who, having actually received a taxable net income over and above exemptions and deductions from gross income, nevertheless wilfully attempt to evade or defeat the tax due on such net income.

In order for an attempt to evade or defeat a tax to be wilful under the statute, not only must an obligation exist to pay a tax on net income actually received, but not reported, but there must also be a specific wrongful intent, that is, actual knowledge on the part of the defendant of

the existence of such obligation and a wrongful intent on his part to evade or defeat such obligation.

Accordingly, I charge you that unless you find from the evidence, beyond a reasonable doubt, that the defendant received a net income for any of the years in question, over and beyond the amount reported by him in his income tax [fol. 2085] returns, and that with an intent to evade the obligation due to the United States on such income, he failed to report the same, your verdict must be not guilty.

It is not sufficient for the Government to prove merely that the defendant received money, but that an income tax was due from the defendant for the years in question over and above the amount reported by him, and that he wilfully attempted to evade or defeat such tax.

If after a comparison and consideration of all of the evidence, you cannot come to a reasoned conclusion, that the defendant had a net taxable income in excess of that which he reported in any of the years, 1935, 1936 and 1937, your verdict must be not guilty.

The burden is not upon the defendant to show that his income tax returns are correct. On the contrary, the burden is upon the Government to show that his income tax return was incorrect; that the defendant knew it was incorrect, and that he knowingly filed an incorrect and false return for the purpose of wilfully evading or defeating an income tax.

As I have already told you, the elements of the offenses charged in the indictment are that the defendant had a net income over and above that reported by him and that he wilfully attempted to evade the tax due thereon; I charge you that although he may have had a net income over and above that reported, and that he failed to report such excess net income, nevertheless if you find that he had no intention to violate the income tax laws when he filed the return, your verdict must be not guilty.

Although as a matter of strict construction of the law, the defendant may have taken as deductions from gross income, items which the law does not allow him to deduct, nevertheless, even though the defendant may have been wrong in his decision as to items which were deductible, if you find that he did so in the honest belief that he was entitled to take such deductions, and that based on such deductions he arrived at the net income reported by him,

[fol. 2086] and made what he believed was an honest return, the Government has failed to prove its charges and your verdict accordingly must be not guilty.

Many questions in connection with the income tax laws are involved, intricate, technical and difficult, upon which lawyers and judges often disagree. If, therefore, you find that in determining what deductions should be taken for the purpose of his income tax, the defendant used good faith, even though you may find that such deductions were nevertheless not allowable deductions, then your verdict must be not guilty.

The Government introduced evidence to prove that the defendant did receive from the numbers game $45,750 in 1935. The defendant concedes that he received this money and that he received $62,400 in 1936 and he admits receiving $50,400 in 1937. Since the defendant admits receiving these sums from the numbers game, he should have reported these sums on the face of his income tax returns.

The fact that the defendant derived a substantial portion of his income during the years in question from illegal sources did not exempt him from making a return under oath for any of those years, stating specifically the items of his gross income and the deductions and credits allowed by the applicable revenue act.

The purpose of the income tax return is to enable the Commissioner of Internal Revenue or his agents to determine if a correct tax has been paid. Accordingly, the receipts from the numbers game should have been reported by the defendant on his income tax return, just as the income from the Mays Landing Record and the American Oil Company. If you find from the evidence that the defendant's failure to exclude from the deductions taken in his returns items which were not properly allowable as deductions was due to negligence or unintentional error, then there would be no attempt to evade or defeat his tax. If, however, you find from the evidence that the defendant's failure to exclude such items which were not properly al- [fol. 2087] lowable was done with a deliberate purpose to evade or defeat the tax law, then you may find that the necessary intent was present.

A man may not shut his eyes to obvious facts and say that he does not know. He may not close his observation and his knowledge to things that are out in the open and

are obvious to him and say, "I have no knowledge of those facts." He must exercise such intelligence as he has and, if the evidence shows that he believed he was taxable but desired and intended to conceal his true tax from the government, then he was not acting in good faith. This question of intent is a question you must determine for yourselves from a consideration of all the evidence. In determining what the defendant's intent was you may take into account any evidence of concealment of facts by the defendant. In this connection you may consider the fact that his returns did not disclose the source of this money from the numbers men, nor the total amount thereof, nor the deductions claimed. You may also consider the testimony that he made no inquiry from anybody, including his accountant, as to whether the claimed deductions were allowable, and that he had no basis for his belief that they were allowable, although he knew that some deductions were not allowable.

In this connection I charge you that if you find that the defendant tried to mislead the government, its agents or investigators, you may consider whether such an attempt to mislead or conceal indicates a consciousness of guilt or guilt itself. You are to determine whether there was any misleading on the part of this defendant. That is a question of fact for you to determine.

It is for you to determine from all the evidence and all the circumstances whether the defendant did report as commissions the amount which he believed to be his true income from numbers. If you believe that the sums shown on the return were intended by the defendant to represent income from numbers the mere fact that the item is desig- [fol. 2088] nated commissions is immaterial. On the other hand, you may believe that the items reported as commissions were not money from this numbers game, but really were commissions of some sort which have no connection with this numbers income. You may also consider the testimony of the defendant's secretary and accountant that they did not know that any of that money was from numbers.

For the year 1935 the defendant showed on his income tax return a net loss of $56,371.83. Now the amount which he admits receiving from the numbers game is $45,750. So, for the year 1935, even if he were entitled to no deductions

from the income received from the numbers game, he still would not be liable for a tax unless he received the $28,000 from the railroad contract.

The first count of the indictment—as I have said, this is somewhat repetitive—which relates to the year 1935, charges that the defendant had a net income of approximately $17,000 upon which he owes a tax. I charge you that if you find either that the item shown in his return as commissions represents money he received from numbers, or that he did not receive the $28,000 under the railroad contract, then, in either event, your verdict on that count must be not guilty.

For the year 1937 the defendant admits that he received $30,400 from the numbers game. The Court called as its own witness Martin Michael, who testified that he took over Weloff's job of handling this protection money, but claimed that he gave it to Inspector Ferretti of the police department and not to the defendant, Johnson. The government did not vouch for Michael and is not bound by his testimony. Weloff testified that when that job was taken away from him, he told Johnson that the numbers syndicate had agreed that Michael would take that money to him thereafter, instead of Weloff. It is for you to decide whether the money that Michael—Jack Southern—handled in the last two months of 1937 actually was received by [fol. 2089] Johnson in accordance with the original agreement that the numbers men had with him to give them protection.

You are the exclusive judges of the weight of each of the several items of evidence and are also the exclusive judges of the credibility of each of the witnesses, and the weight to be given to their testimony. You may consider their appearance on the witness stand, whether they testified with candor or otherwise, and their interest in the case, if any.

Evidence has been produced that Corio was indicted in 1938 on the charge that he wilfully attempted to evade an income tax for the year 1935, and that his case has not yet been tried. I charge you that in weighing his testimony you may consider whether he testified as he did with the hope that he will secure immunity or other favorable treatment in that case. I further charge you that the fact that his case still remains untried may be considered by you as bearing on such hope.

The witness Towhey was convicted in May, 1941, of perjury, and the witness Weloff pleaded guilty to a charge of perjury on June 2, 1941. Both remain unsentenced. I charge you that in weighing their testimony you may consider whether one or both testified as they did with the hope that one or both will secure immunity or other favorable treatment in their respective cases.

I further charge you that the fact of such delayed sentences may be considered by you as bearing on such hope.

I also charge you that in considering the credibility of those two witnesses you may consider whether their testimony was or was not substantially corroborated by the admission of the defendant Johnson who said that he received from them $1200 a week during a considerable period.

In determining the credibility of witnesses you may take into consideration the fact that some of the government witnesses have been previously convicted of crime and that [fol. 2090] some of them have been convicted of perjury, which is intentionally giving false testimony under oath as to the material fact. You should consider such previous convictions in determining the weight you will give to their testimony. And if there is in your mind a reasonable doubt as to the truth of any testimony on the part of a witness for the government, such doubt must be resolved in favor of the defendant by rejecting such testimony.

If you find that any witness who has testified here has wilfully or knowingly or intentionally testified falsely before you concerning a material fact in the case, you may reject all or any portion of the testimony given by such witness; but you are not required to do so; that is a matter for you to determine.

Where it appears that any witness has wilfully testified falsely respecting a material matter, the jury may reject his testimony in its entirety or may accept such part as it believes was the truth. However, the test is whether or not the witness lied at this trial, not whether he lied on some prior occasion. For example, the witnesses Weloff and Towhey have admitted that on other occasions they have committed perjury. That does not mean that you should not believe them at this trial. The question in determining their credibility here is whether or not you believe they lied to you here at this trial. The principal

testimony they gave was that they delivered money to the defendant each week for the numbers game. Now the defendant has admitted that he received the money and consequently that they told the truth on that subject.

I instruct and direct you not to have any prejudice or bias against the defendant because he has received large sums of money annually from a gambling enterprise operated in violation of the gambling laws of the State of New Jersey. The defendant is not on trial for violating the gambling laws of this State. He is being tried for wilfully attempting to evade or defeat an income tax claimed [fol. 2091] to be due to the federal government. This case must be decided on that issue and no other. Accordingly, unless you believe that the defendant received a net taxable income in any of the years 1935 to 1937 inclusive, in excess of that which was reported by him, and that he wilfully attempted to evade or defeat the tax due thereon, your verdict must be not guilty.

You are to determine the issues without regard to whether the defendant received income from a legal or an illegal business or source. The defendant stands here before the bar of justice in the identical position of any other citizen charged with a similar offense in connection with a lawful business, and you, as jurors, must weigh and consider the evidence judicially and impartially so that you may bring in a verdict in accordance with the proofs on the question at issue, uninfluenced by the evidence which discloses the source of the money.

Interest creates a motive for false testimony; the greater the interest the stronger is the temptation, and the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. The peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and is to be carefully considered by the jury.

Obviously, the defendant has a very great interest in not being convicted of this crime, and you must consider whether or not, in his desire to escape the consequences of conviction he has testified to that which is false.

The defendant has produced witnesses who have testified as to the good reputation which the defendant bears and bore during the years 1935 to 1937 as to his truth and

veracity. I charge you that one of the essential elements of the charges against him is that he filed a false return under oath. I further charge you that all of the testimony, [fol. 2092] including that relating to his good reputation for truth and veracity, must be considered by you and if, on such consideration, there exists a reasonable doubt of his guilt, even though that doubt be engendered by his previous good repute, he is entitled to a verdict of not guilty.

And again: Certain testimony has been introduced in this case on behalf of the defendant in support of his previous reputation for truth and veracity. The law requires that you should consider such testimony like the rest of the evidence in the case and give it such weight as you deem fit. I must caution you, however, that the mere circumstance that a person has borne a good reputation for truth and veracity prior to the time that he was accused of the crime should not be used by a jury as a means of excusing the commission of a crime or showing leniency to one as to whom the evidence, other than that in connection with his evidence of good reputation for truth and veracity, entirely satisfies the jury on the matter of his guilt.

In your consideration of the evidence in this case you must adhere strictly to the following rule, which I charge you as a matter of law:

You are not to be persuaded by the fact that the government of the United States is a party to this action, for I charge you that the government is to be considered as any other party and its counsel as any other counsel for any other party.

You must consider only the evidence in this case.

You are to disregard answers of witnesses which the Court has directed to be stricken out at any stage of the trial.

You are to disregard all arguments of counsel directed to the Court upon questions of law, upon motions for the admission or exclusion of evidence, as well as to the rulings of the Court upon all such matters, whether in favor of the government or in favor of the defendant.

You must discard any suggestion which may have been [fol. 2093] conveyed to your minds by any question which was not allowed, as well as any suggestions or innuendos which may have been conveyed to your minds by things not in evidence.

The issue, as I have indicated, is whether Mr. Johnson wilfully sought to evade income taxes due upon his income for these three years. Now, the questions are comparatively simple in spite of the length of the trial and the large number of legal points to which I have referred, all of which, however, have their bearing.

The first issue relates only to 1935 and it is whether or not the defendant, Mr. Johnson, received the payment of $28,000 from Anthony P. Miller, Inc., as charged by the government. The receipt of any such payment as this is categorically denied by the defendant and a square issue of fact is thus raised which you must consider and decide. Counsel on both sides in their addresses have referred at length to the testimony bearing upon this question of fact. I shall therefore not refer to the testimony in any detail and merely repeat that you must consider all of this evidence in the light of your own recollection, not accepting what counsel says with regard to it, if you think their recollection is inaccurate; and upon considering the evidence in the way which I have indicated, you must determine whether the government has proved beyond a reasonable doubt that the defendant received the $28,000 in question in the year 1935 as charged.

The second issue for your consideration relates to each of the three years in question and involves the question whether the defendant, Mr. Johnson, received income from the numbers business as to which he evaded the income tax due to the government. The charge is that in 1935 he received $46,400; in 1936, $62,400, and in 1937, $62,400 from this source, and that he failed to report this income in his returns for those years, or to pay the taxes due thereon.

The defendant at the trial has acknowledged that he did [fol. 2094] receive $45,750 in 1935 and $62,400 in 1936 and that he received the weekly payments of $1200 each up to November, 1937, a total of $50,400 in 1937. You must, therefore, accept this much of the government's charge as an undisputed fact in the case, and you may decide, from the evidence, whether he did not also receive payments of $1200 a week during the remainder of 1937.

The defense to the government's claim in respect to the numbers money, as I understand it, is that the defendant did return in his income tax returns a portion of these moneys, that the portion which he returned he designated in the returns as "commissions"; that the portion so re-

turned and so designated represented what he retained of the numbers money for his own use, after he had made certain expenditures out of these moneys, and that he believed that he was entitled to take the deductions for these expenditures and to report for taxation only the excess. The defendant concedes that the funds received by him from the numbers of people constituted taxable income to him, and as I understand his position, he does not claim that the deductions which he took in arriving at his figures were legally deductible under the terms of the income tax law; his defense is that when he took these deductions and reported the net amount only he believed that he was entitled to do so under the law, and that he did so in good faith without any intent to evade tax thereon.

Accordingly, the question on this phase of the case comes down to whether the defendent did act in good faith in this respect. The determination of this question is for you upon the evidence. Without attempting to refer to all the evidence on this point, I will call your attention to certain portions of its which seem to me to be material for your consideration. The first, of course, is that the defendant upon the witness stand testified directly that when he acted as he did with respect to these deductions and the computation of the net figure which he says he reported, [fol. 2095] he did so believing that he was entitled, under the law, to the deductions in question.

The question which you are to consider is the state of the defendant's mind when these returns were made. He has testified directly as to what his state of mind was; consequently, the only way in which the government could establish the contrary is by showing circumstances or prior statements or acts by the defendant which tend to indicate that he did not, in fact, believe that he was entitled to the deductions in question. In this connection, the government points to the fact that in each of his income tax returns he described as commissions the moneys which he now says represented the net receipts from the numbers people. Then there is also the fact that in the three income tax returns in question he went into great detail in regard to many deductions from gross income derived from other sources but completely failed even to disclose the fact that he claimed deductions in connection with the item which he described as commissions. In line with this is his admitted failure to consult Mr. Bewley, the tax expert, whom

he retained to prepare his return and who did prepare the detailed schedules with regard to other deductions.

As I understand it, the defendant admits that he never at any time asked Mr. Bewley's opinion as to the deductibility of these expenditures; and in fact he did not disclose to Mr. Bewley the source of the income or the fact that deductions had been taken in computing the figure which he furnished for inclusion in the return; and in this connection I recall that Mr. Johnson admitted on the witness stand that he knew that certain types of expenditure were not deductible for income tax purposes and that, although he himself had not made a study of the income tax law, he never consulted anyone as to the tax status of the items here in question, nor was he able to give any basis outside of his own mind for what he now says was his sincere belief that he was entitled to act as he did in this matter.

[fol. 2096] In considering the question of the defendant's good faith you should therefore determine whether the circumstances to which I have referred and any others that you may recall from the testimony, establish to your satisfaction beyond a reasonable doubt that the defendant in this case was not acting in good faith but rather was attempting by concealing the amount of his gross receipts and the deductions claimed therefrom and by describing the net result as commissions, to evade the tax which he owed to the government upon this money.

There are two further questions to be considered in connection with these transactions that also bear upon the defendant's intent: First, did the item "commissions" which the defendant reported actually represent a residue of numbers money or was it in fact income from some other source more properly described by the term "commissions"? Defendant now testifies that these commissions were in fact numbers money and would even have you believe that he used the term "commissions" in an attempt to conceal the true nature of this money. Does this show good faith? You may, from all the facts and circumstances, reach the conclusion that the defendant's statement under oath in his income tax return that these funds were commissions is the fact and that his present testimony is not true; that is entirely for you to say.

Then you have the question whether the expenditures which the defendant claims as deductions were actually

expended by him out of the numbers money. The defendant has offered in evidence a large number of receipts for money given out by Mr. Boyd and others from funds which they testified were furnished to them by the defendant. The purpose of these expenditures covers a very wide range, but the defendant contends that they were all for political purposes of one kind or another. Mr. Johnson admitted that he received campaign contributions from many other sources than the numbers people. The govern- [fol. 2097] ment contents, as I understand it, that these payments may well have been made out of the funds thus contributed directly for campaign purposes and not out of the numbers money. You will recall that Mr. Johnson testified that the entire expense of his political organization was paid out of this numbers money. It is for you to determine whether this testimony is credible or whether, on the contrary, the fact is that the expenditures made by Mr. Boyd and his associates were, in whole or in part, made out of other funds contributed to Mr. Johnson for campaign expenses. If so, obviously he could not, in good faith, have believed he was entitled to deduct them from the numbers income. As I have indicated, defendant testified that each year he received around election time many campaign contributions including $1500 from the numbers people. These, he said, were to help defray campaign expenses; and he further testified that he expended these sums for the purposes for which they were given to him. The government does not claim that any of these campaign moneys were income to the defendant or that he owned income tax on them or that he evaded payment of tax on them. It accepts the view that as to such money as this the defendant was merely an agent of the party to receive on behalf of and to expend for the party, contributions made to it. A number of you are active in party affairs, being members of the County Committee or political clubs; it may be that some of you have received just such money as this for the work of your party and have expended it for the purposes for which it was received, and have quite properly omitted all reference to it in your own income tax returns, since it was not in any sense your income. This, however, is a situation entirely different from that which is involved in the charge made against this defendant, which is that he personally received moneys for his own use over which he had absolute and undisputed ownership, and that he evaded the

income tax due on those moneys. Any comparison which [fol. 2098] counsel for the defendant may have sought in his summation to make between such a charge as is made against this defendant and experiences which some of you or some members of your family or acquaintances as political party workers may have had in connection with the receipts and expenses of campaign funds, is entirely misleading and should be completely discarded in your consideration of this case.

As I have already indicated to you many matters have been argued in this case which really have nothing to do with the comparatively narrow issue which you are called upon to decide. It is your duty to discard all of these extraneous matters in your consideration of this case and to confine your attention to the issues, as I have indicated them, namely, whether the defendant received a payment of $28,000 from the Miller Corporation in 1935 and whether he wilfully evaded his income tax by failing to report the numbers money upon which he was actually taxable.

In determining the wilfulness of defendant's actions you must consider his good faith in these transactions, as I have already pointed out to you. Unless you are satisfied beyond a reasonable doubt that the defendant did evade his income taxes for any one or more of the years in question, it is your duty to find him not guilty upon the counts in the indictment involving those years. If, however, the government has satisfied you beyond a reasonable doubt that the defendant was guilty of the offense charged for any one or more of the years in question it is your duty to find him guilty of the charges contained in the counts of the indictment relating to those years.

It is your duty to confer with your fellow jurors and discuss the evidence with them. The verdict which you render must represent the real judgment and honest conclusion of each of you, and no one of you may surrender his earnest belief concerning the guilt or innocence of the defendant or for the purpose of arriving at a compromise, notwithstanding the duration of this trial.

[fol. 2099] The jury is composed of twelve men and women. While undoubtedly their verdict shou l represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the juryroom. The very object of the jury system is to secure unanimity

by a comparison of views and by arguments among the jurors themselves. Each juror should listen, with a disposition to be convinced, to the opinions and arguments of the others. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors who are equally honest and intelligent with himself.

Your duty in this case is a solemn and a responsible one. In our system of government no greater duty is imposed upon a citizen than that performed by a juror in a criminal trial. If the facts do not warrant a conviction, it is your duty to acquit the defendant, but on the other hand if the facts do warrant a conviction it is your duty fearlessly and courageously to pronounce him guilty by your verdict.

The trial of this case has covered several days. It is necessary to emphasize its importance, or the gravity of the responsibility which rests upon you. Your duty requires that you carefully weigh the testimony and decide the case upon the facts and circumstances admitted in evidence. In reaching your verdict, you should consider nothing but what has occurred in the courtroom during the trial. At the time you were sworn as jurors, each and every one of you swore that you knew of no reason why you could not fairly and impartially try the issues in this case and decide them without bias, prejudice or sympathy, either for the Government or for the defendant. Your Verdict must be the result of weighing and considering the evidence, and of that alone. You must weigh it carefully and fairly. This case is important to the defendant because his liberty may be at stake, and it is important to the Government be- [fol. 2100] cause it is essential that the income tax law be enforced. Weigh the case carefully and fairly. You are to do justice between the Government of the United States on the one hand, and the defendant on the other. Take this case under your oaths as jurors with an eye single to performing your duties fairly and squarely, and do not concern yourselves in any wise with the consequences of your verdict, be it what it may.

Gentlemen, I have incorporated in my charge substantially all of your requests with the exception of the following: I refuse, as not based upon the evidence the Defend-

ant's Requests No. 14 and No. 19. And I refuse; as drawn, the Defendant's Requests 17 and 18 and the Government's Request No. 10.

Are there any matters to which counsel would like to call my attention? Have you any requests to make with regard to the charge or exceptions to take?

Mr. Winne: Yes, we desire to except to your Honor's failure to charge requests 14 and 19 and failure to charge requests 17 and 18.

The Court: Exception allowed.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed)

Mr. Winne: And I want to except to that part of your Honor's charge in which your Honor said that the defendant should have reported the full amount of the receipt of moneys from numbers and then reported the deductions and shown the difference, in that the law does not require any form of report to be made by the defendant, merely that he should report his income.

[fol. 2101] The Court: Well, members of the jury, I think that that is strictly true as a matter of law, and I think that you need only consider that question insofar as it bears upon the good faith of the defendant, in determining whether or not he made a full disclosure to the government.

Mr. Winne: I respectfully except to that part of your Honor's charge in which you said the defendant did not claim that any deductions he made were proper deductions under the law. We assert that the deductions which were made were proper deductions under the law and could so have been established had that been the issue in the case. The issue in this case being the good faith of the defendant, we merely maintained for the purpose of this trial that they mere made in good faith but we did not say they were not proper deductions.

The Court: Well, if that is the defendant's position I didn't so understand it, members of the jury. Then you have the question of determining, in addition to the question or as an alternative—I am not sure that I clearly understand your position. I would like to have you state it again.

Mr. Winne: Your Honor, the issue in the case as I understand it is the intent of the defendant and therefore you properly left for the jury the question of whether the defendant did what he did in regard to these deductions in good faith, but you stated what I think was erroneous to the jury, namely that the defendant did not claim that they were proper deductions.

The Court: Well, you feel that that is a matter which bears upon his intent?

Mr. Winne: Certainly it does.

[fol. 2102] The Court: Well, I think that is true, members of the jury. The law provides that a man may not deduct personal expenses but may deduct the ordinary and necessary expenses of a business in which he is engaged and out of which the income being taxed is derived. Now, if you find that these expenses that he claims to have been made were ordinary and necessary expenses of a business in which he was engaged, that would be considered by you in determining whether he acted in good faith in this matter.

Mr. Winne: If your Honor please, there was a place in your Honor's charge where you said there were two further questions bearing upon the defendant's intent which the jury should consider, and I think that inadvertently your Honor gave the impression that there were only two further questions.

The Court: Well, I didn't intend to, Mr. Winne. I tried to make clear that I was not attempting to mention everything or to give a catalogue of all the parts of the testimony. I indicated some that had occurred to me which I thought I might fairly call to the attention of the jury, but I want you to consider everything else in the case bearing on the question of good faith both ways, both sustaining the defendant's good faith and, as the government contends, tending to show that he did not act in good faith.

Mr. Winne: Now, the next thing we are going to disagree on, I know. I except to that part of your Honor's charge in which your Honor said that the jury could find from the evidence that these things reported as commissions did not come out of the numbers money, but were commission from some other source.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed)

[fol. 2103] Mr. Winne: No such evidence in the case.

The Court: I think the evidence of the income tax returns themselves, which are sworn testimony, may be considered by the jury in that connection.

Mr. Winne: I don't think I need another exception. I except to that.

The Court: Certainly not. I understand you except to that entire subject.

Mr. Winne: Your Honor stated, I think, that all money which Mr. Johnson spent for campaign expenses came out of the numbers money, and I think in that there was some erroneous statement of fact because the testimony was that he spent some money out of his pocket that he did not claim as deductions.

The Court: Did I say that? I thought it was that—I have it here—I said, "Mr. Johnson testified that the entire expense of his political organization was paid out of this numbers business." Now, I meant by that as I understood his testimony—you will remember this, of course, members of the jury, and take your own recollection, but I understood him to say, I think in answer to a question of mine, that this numbers money provided funds from which he paid all the expenses of his personal political organization, not the party, but in the organization that he maintained, in which I think there was some distinction indicated as between his personal political clubs and the Republican Party. He did say, as I recall, that some expense of that kind was paid out of that money, that this was the sole source. If I am wrong on that, members of the jury, you will of course ignore what I said on that subject. [fol. 2104] Mr. Winne: I think also your Honor said that he expended the moneys received for campaign funds including $1500; your Honor was in error. He did expend the $1500 but the testimony was that other moneys he turned over to Mr. Whitman for campaign purposes.

The Court: Mr. Winne may be right. You will take your own recollection there again.

Mr. Winne: Those are trifling. I want to except to that part of your Honor's charge, almost at the conclusion of the charge, where you said if they find that he received $28,000 from the Miller contract that he was guilty under count number 1. That in itself would not be enough.

The Court: I tried to be clear on that in answer to the instruction. If I said that I said it inadvertently. The

$28,000 alone is not sufficient to support a verdict of guilty because it does not raise his income above the loss, which I think was fifty some thousand. Obviously, $28,000 taken off a loss of $50,000 still leaves a loss so that he would not have any tax unless the numbers money came into it also in 1935. Anything further, Mr. Winne? Mr. Mehler, anything further?

Mr. Winne: Yes, your Honor in charging government request number 16 on the question of whether or not the jury could disregard, if they saw fit, the testimony of Weloff and Michael or other witnesses, if they lied intentionally on the stand here before the jury, your Honor instructed the jury that the principal testimony they gave was that they delivered money to the defendant each week for the numbers game. Now, the defendant has admitted that he received that money and consequently that they told the truth on that subject. Now, we believe that wasn't the only principal testimony given by them. We believe [fol. 2105] that the transaction or the conversations that they had with Johnson are just as material as the other.

The Court: I will withdraw the word "principal"; it was a substantial part of their testimony and certainly was a very vital part of their testimony in this case, namely, that the money was given. It is that money with which we are concerned and that was admitted by the defendant, that particular part of it.

Mr. Winne: Yes, but I thought I would call that to your Honor's attention.

The Court: You could hardly disbelieve the testimony of Weloff and Towhey that they turned over money to Johnson when he admits that he got it from them. Now, anything else in their testimony of course you may disbelieve if you feel that it is not to be believed, that they are lying to you.

Mr. Winne: That is all.

Mr. Burns: In view of the additional charge that the Court gave at the request of the defendant, I believe that the jury should again be charged specifically that under the income tax law there is not recognized any business of politics and that these expenses that are claimed as a matter of law are not deductible as necessary and ordinary expenses of a business and that, as a matter of law, a tax is due on the amount that he claimed as deductions; but that, of course, if the defendant was in error as to

the law, and believed that they were deductible, that he would not be guilty of evasion even though he would be liable for a tax.

The Court: I think my instructions have been sufficient on that point. Is there anything further?

[fol. 2106] In United States District Court, District of New Jersey

[Title omitted]

Motion for New Trial—Filed July 28, 1941

Now comes the defendant, Enoch L. Johnson, and moves for a new trial, and in support thereof, assigns the following reasons:

1. The verdict was against the evidence.

2. The verdict was against the weight of the evidence.

3. The verdict was against the law.

4. The verdict was against the charge of the Court.

5. The Court erred in permitting the Government's attorney, over objection, to inquire of the defendant, "Did you receive any money from numbers in 1938?" (Record 1506-1507.)

6. The Court erred in compelling the defendant to claim his privilege under the Fifth Amendment in answer to a [fol. 2107] question as to what he did in 1938. (Record 1523.)

7. The Court erred in not dismissing the first count of the indictment at the conclusion of the Government's case, and of the entire case.

8. The Court erred in refusing to affirm and read defendant's request for charge No. 14, record 2063, to the effect that if he returned the balance of money received for political contributions, he was not guilty of the crime charged.

9. The Court erred in refusing to affirm and read defendant's request for charge No. 17, that defendant was entitled to deduct from money received from numbers such

sums as he expended in carrying out the purpose for which the money was given. (Record 2064.)

10. The Court erred in refusing to affirm and read defendant's request for charge No. 18, to the effect that the failure of defendant to report deductions in detail on his return was no evidence of fraudulent intent. (Record 2064.)

11. The Court erred in refusing to affirm and read to the jury defendant's request for charge No. 19, to the effect that his appearance before the Grand Jury and his refusal to testify should not be taken into consideration in arriv-
[fol. 2107a] ing at his fraudulent intent in the case on trial. (Record 2065.)

12. The Court erred in that portion of its charge in which he instructed the jury that the failure of the defendant to include in his return the full amount of numbers money received by him might be evidence of fraudulent intent. (Record 2006, 2007, 2008.)

13. The Court erred in that portion of its charge wherein it instructed the jury, in the absence of evidence, that the amounts reported in the returns under the head of Commissions could be found by them to represent other than receipts from numbers money. (Record 2033.)

Walter G. Winne, Atty. Deft.

Ben Golder of Counsel.

[fol. 2107] [File endorsement omitted.]

[fol. 2108] In United States District Court, District of New Jersey

Oral Opinion Denying Motion for New Trial

(After Argument by Counsel)

Gentlemen, the motion for a new trial has been filed in this case setting forth thirteen reasons why a new trial should be granted. From the oral argument, I take it that only two of those reasons are pressed at this time, and I might say at the outset I have considered the others and it seems to me none of them have any substance.

The first reason now pressed relates to the fact that the court permitted the jury to give consideration to the income tax returns of the defendant which were offered in evidence and which stated certain sums of income described therein as "commissions." As I understand it, the defendant is now objecting that those returns should not have been admitted into evidence because the defendant in so stating the income which he now claims to have been from the numbers business, was in effect claiming his constitutional immunity against self-incrimination. That argument is made for the first time on this motion and was not suggested during the trial, and in my judgment it has no substance because there is no evidence here to indicate that the defendant in making his return in that form intended thereby to claim his privilege of concealing or not stating the true sources of his income, there is no indication or suggestion prior to this argument that he would or could have incriminated himself in any way of any federal offense by stating directly that this income was from sums received from the numbers business. It seemed to me during the trial, and I still feel that the fact that the defendant in stating his return described his income as from "commissions", a recognized source of income received by many people, it being normally understood as a sum received from a percentage upon the gross sales price or [fol. 2109] other gross figure for services rendered, that when the defendant made that statement in his return, it was competent for the jury to consider whether he did so in order to conceal from the government authorities the true source of his income, the true amount of his income and thereby to assist in evading the tax. In other words, it seems to me that it was highly competent evidence upon the question of the defendant's intent whether he had a criminal intent or not, particularly in view of the fact that although he claimed at the trial large sums as deductions on this income which he has not stated in his return, his return did state in detail, very specifically, a large number of other deductions which he did claim.

I accordingly am of the opinion that the first point raised is without merit.

The second point is, as I understand it, that it was incompetent to cross-examine the defendant as to his income from the numbers, whether he had any income from the numbers in 1938. The primary question raised is that that

was not proper testimony. It seems to me now as I felt then when the evidence was being offered that it was highly material to test the credibility of the witness who had stated whereas he had received numbers income during 1937 up until about November 1st, he ceased receiving that income during November and December. Certainly his statement that he did receive numbers income in 1938 has a very direct material bearing upon the credibility of his statement that he did not receive it during the last two month of 1937, particularly in view of the fact that he was unable in any way to explain the reason for the income having ceased to come to him at that time.

Insofar as his claiming privilege is concerned, I may have erred in favor of the defendant in that matter. I felt that he should not be obliged to testify against himself or offer evidence which might incriminate him of another crime if he felt that he had committed a crime in 1938 and that his testimony as to 1938 income might tend to incrim- [fols. 2110-2111] inate him and I did not feel that he ought to be compelled to testify even though he had offered himself as a witness in his own defense. Accordingly he was given the privilege of claiming his privilege and his counsel was permitted to advise him of his rights and did advise him, and he claimed his privilege. I do not see how he could be protected in any other way in view of the fact as I felt then and still feel, that the evidence as to the issues here being tried was highly relevant and material. Accordingly I conclude that the second point also is without merit.

The motion for a new trial is accordingly overruled. The defendant shall present himself for sentence tomorrow morning at 10 o'clock.

* * * * * * *

[fols. 2112-2113] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

JUDGMENT

Sentence on Ct. 2 Fine $10,000 and 5 years U. S. Pen Custody A. G. etc.

On Ct. 3 fine of $10,000 & 5 years U. S. Pen custody A. G. etc.

said terms to run consecutively making 10 years in all said fines to be accumulative, together with costs of prosecution, and stand com. until fines are paid (Maris)

* * * * * * *

[fol. 2114] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title omitted]

NOTICE OF APPEAL—Filed August 1, 1941

Name and Address of Appellant: Enoch L. Johnson, 110 So. Iowa Ave., Atlantic City, N. J.

Names and Addresses of Appellant's Attorneys: Walter G. Winne, 210 Main Street, Hackensack, N. J.; John Rauffenbart, Schwehm Bldg., Atlantic City, N. J. and Benjamin M. Golder, 1622 Chestnut Street, Philadelphia, Pa.

Offenses: Appellant was charge under an indictment containing three counts with the following offenses:

The first count charged that on March 9th, 1936 appellant wilfully attempted to evade and defeat an income tax in the sum of $1232.18 upon his net income for the calender year 1935 by means of an income tax return wherein he understated his net income.

The second count charged that on March 15th, 1937 appellant wilfully attempted to evade and defeat an income tax in the sum of $19,957.30 upon his net income for the calendar year 1936 by means of an income tax return wherein he understated his net income.

The third count charged that on March 15th, 1938 appellant wilfully attempted to evade and defeat an income tax in the sum of $18,759.10 upon his net income for the calendar year 1937 by means of an income tax return wherein he understated his net income.

[fol. 2115] Date of Judgment: Judgment was entered on August 1st, 1941.

Description of Judgment or Sentence: Appellant was acquitted by the jury under the first count of the indictment and was found guilty under the second and third counts thereof. He was sentenced to serve five (5) years *years* imprisonment and to pay a fine of $10,000, on the second

count and to serve (5) years imprisonment and to pay a fine of $10,000 on the third count, the sentences to run consecutively, and to pay the costs of prosecution, making a total of ten (10) years imprisonment, $20,000 in fine, and costs of prosecution.

Name of Prison where Appellant is now confined: Appellant is now confined in the custody of the United States Marshal for the District of New Jersey.

I, Enoch L. Johnson, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment above mentioned on the grounds set forth below.

Enoch L. Johnson, Appellant.

Dated, Camden, N. J., August 1st, 1941.

Grounds of Appeal

1. The trial court erred in admitting, over objection of appellant's counsel, evidence which was prejudicial to appellant.

2. The trial court erred in excluding, over objection of appellant's counsel, evidence, material and pertinent to the issue.

3. The trial court committed prejudicial error in its charge to the jury.

4. The trial court erred in refusing to charge the jury as requested by appellant.

5. The trial court erred in permitting government coun-
[fol. 2116] sel, over objection, to examine appellant and compelling appellant to claim his privilege under the Fifth Amendment to the Constitution.

6. The trial court erred in permitting the case to go to the jury.

[fol. 2117] [File endorsement omitted]

Service of the within notice of Appeal and receipt of a
7. The verdict was contrary to the evidence.

Walter G. Winne of Counsel for Defendant.

copy thereof are hereby acknowledged this—day of August, 1941. Joseph W. Burns, Special Asst. to the U. S. Attorney.

[fol. 2118] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

[Title omitted]

ADDITIONAL GROUND OF APPEAL—Filed August 27, 1941

As an additional ground of appeal, the defendant says:

1. The Trail Court erred in excluding the defendant, Enoch L. Johnson, from the court-room during the course of the trial.

Benjamin M. Golder of counsel for Defendant.

[fol. 2119] [File endorsement omitted]

[fol. 2120] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

[Title omitted]

ASSIGNMENT OF ERRORS—Filed September 18, 1941

And now comes Enoch L. Johnson, defendant appellant, and says that in the record, proceeding and judgment aforesaid, there is manifest error, and for assignment thereof says that:

1. The Trial Court erred in permitting the witness Benjamin Ravinsky to answer, over objection and exception, the following questions, N. T. 680:

"Q. At this table where you say the men worked, how many adding machines were on that table?

The Court: Repeat the question.

(Question read.)

A. Well, there was fourteen machines and there was eight or ten on one table, and they had another small table for a couple of others, didn't have enough room for them on one table.

Q. Did each of these numbers banks have a local drop or headquarters where the slips were brought in from the writers?

A. Pretty near all of them did, maybe the night one didn't.

Q. Maybe the night one didn't. Did each bank have some man designated to bring the slips from the local headquarters up to the general headquarters?

A. They did.

Q. Now, about how many pick-up men did this syndicate have working for them going around to different stops? [fol. 2121] A. I should say around seventy.

Q. About how many different books or stops were there writing for the syndicate?

A. That is storekeepers and all?

Q. Yes, storekeepers and all day and night?

Mr. Winne: May I have an exception to this line of testimony without objecting to each question?

The Court: You may. I think the government is entitled to show the character of this enterprise and its size.

Mr. Winne: I don't have to object to each question, your Honor?

The Court: No.

Mr. Winne: Thank you.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed)

A. Day and night?

Q. Yes.

A. It is hard to say. Night time there would be quite a few. Day stops, there might be seven or eight hundred, but night time, I couldn't tell you that.

Q. About seven or eight hundred in the day time?

A. That is right.

Q. In the operation of your business, daily, was any record kept, a daily record of the business?

A. There was."

2. The Trial Court erred in permitting the witness, Ralph Weloff, to answer, over objection and exception, the following questions, N. T. 719:

"Q. After they complained to you what did you do?

A. I usually went to Ralph Gold and reported to him—" (N. T. 721)

[fol. 2122] "Mr. Winne: Without in any way offering to show that the complaint was transmitted by Gold to Johnson and that Johnson did anything.

Mr. Burns: That's right.

Mr. Winne: Then of course I can just enter my objection.

The Court: Yes, I think it is admissible.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed)

3. The Trial Court erred in refusing, over objection and exception, to strike out the answer of Ralph Weloff to the following question, N. T. 721:

"The Court: Perhaps you can ask him the question, Mr. Burns.

"Q. When the complaints were made to you by the numbers men did you go to Ralph Gold?

A. Whenever there was too many arrests made these backers usually came to me and complained to me about them. I took those complaints to Ralph Gold.

Q. Then what happened?

Mr. Winne: Your Honor please, the question did not permit me to make an objection because there was nothing the matter with the question; the trouble is with the answer.

The Court: You move to strike it out?

Mr. Winne: I move to strike out the answer.

The Court: Motion overruled. You may have an exception.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed)"

4. The Trial Court erred in permitting the witness, Ralph Weloff, to answer, over objection and exception, the following question relating to testimony previously given by him before the Grand Jury, N. T. 803:

[fol. 2123] "The Court: Will you read the question, please, Mrs. Bergen?

(Question read as follows: "Well, now, why did you lie about it?"

A. I didn't want to do anything or say anything that would hurt Mr. Johnson."

5. The Trial Court erred in striking out on motion of Government counsel, and over objection and exception, the following testimony given by the witness, William E. Frank, relating to the voting of the indictment herein prior to the appearance of the defendant, Enoch L. Johnson, before the Grand Jury, which voted the indictment, N. T. 1093:

"Q. Had it been voted previous to that?

A. It had been voted previous to that.

Q. So that previous to the time that Mr. Johnson appeared before the Grand Jury, the indictment had already been voted?

A. That is correct.

Q. And your office issued a subpoena to the defendant to appear and testify before the Grand Jury while an indictment was pending against him?

A. My office didn't issue the subpoena.

Q. Mr. Burns' office.

A. The subpoena was issued from the Court.

Q. Who issued the subpoena, whose office requisitions the issuance of a subpoena?

A. The United States Attorney's office.

Q. And that is the office that Mr. Burns is connected with?

A. That is correct.

Q. And that subpoenaed this defendant to appear and testify before the Grand Jury which Grand Jury had already voted an indictment against him. That is right, isn't it?

A. That's right."

[fol. 2124] 6. The Trial Court erred in directing the witness, Enoch L. Johnson, to answer, over objection and exception the following question relating to his method of sending up memoranda to show what his net income was: (N. T. 1499):

"Q. How about '38?

A. Yes, I carried on the same policy in 1938."

7. The Trial Court erred in excluding the defendant, Enoch L. Johnson, from the courtroom during the trial of the case as follows: (N. T. 1508):

"Mr. Burns: If the Court please, so long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the

argument, and that when he resumes the stand he should do so without having any opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.

The Court: I think that is a fair request. You may retire Mr. Johnson.

(The defendant withdrew)."

8. The Trial Court erred in directing the witness, Enoch L. Johnson, over objection and exception, to answer the following question, N. T. 1506:

"Q. Did you received any money from numbers in 1938?"

9. The Trial Court erred in directing the witness, Enoch L. Johnson, over objection and exception, to answer the following question, N. T. 1507:

"Q. Did you receive any money from numbers during 1938?

A. Yes, sir.

Q. Who gave it to you?"

[fol. 2125] 10. The Trial Court erred in directing the witness, Enoch L. Johnson, over objection and exception, to answer the following question unless the defendant claimed his constitutional privilege against self-incrimination under the 5th Amendment of the United States Constitution, N. T. 1507:

"Q. Did you receive any money from numbers during 1938?

A. Yes, sir.

Q. Who gave it to you?

11. The Trial Court erred in questioning the witness, Enoch L. Johnson, over objection and exception, as to the receipt by him of money in 1938 and in directing the witness to answer the following questions unless he claimed his constitutional privilege against self-incrimination under the 5th Amendment of the Constitution of the United States, N. T. 1526:

"Q. What money did you use in 1938 for that purpose?

Mr. Wine: Your Honor will allow me an exception.

The Court: He may decline to answer if he wishes.

The Witness: I exercise my right under the Constitution.

The Court: You decline to answer on the ground that it might tend to incriminate you on another charge?

The Witness: Yes, your Honor."

12. The Trial Court erred in directing the witness Enoch L. Johnson, to answer, over objection and exception, the following questions, N.T. 1527:

"Q. I show you Exhibit G-41 for identification and ask you if that is your signature?

A. Yes.

Q. Is that your income tax return for the year 1938.

Q. Mr. Johnson, examine this paper and tell me, if you can what it is?

A. My income tax return for 1938."

13. The Trial Court erred in directing the witness, Enoch L. Johnson, over objection and exception, to answer the [fol. 2126] following questions relating to his income and his income tax for the year 1938, unless the defendant claimed his constitutional privilege against self-incrimination under the 5th Amendment of the United States Constitution, N.T. 1529:

"Q. What money did that represent?

A. I refuse to answer on the grounds that I do not have my records here, and on my rights under the Constitution.

The Court: You may decline to answer upon the ground that it might tend to incriminate you, not upon the ground that you do not have your records here. You might say you do not know, if that is a fact.

The Witness: All right, I refuse to answer as it tends to incriminate me."

14. The Trial Court erred in directing the witness Enoch L. Johnson, over objection and exception, to answer the following question, N.T. 1529:

"Q. Mr. Johnson, did you have an item of 'Other commissions' for the year 1938 as part of your income?

A. Have I a right to refuse to answer?

The Court: You have a right to refuse to answer if you feel the answer to this particular question might tend to incriminate you. Repeat the question.

(The question was read by the reporter.)

The Witness: Yes."

15. The Trial Court erred in refusing to charge the jury as requested by counsel for the defendant as follows, (N.T. 2063) to which an exception was taken:

"14. The jury are further instructed that if you find that the moneys received by the defendant from numbers came to him as political contributions, and that out of such receipts he expended moneys for political purposes, only [fol. 2127] those funds retained by him after such expenditures should be treated as income. Accordingly I charge you that if you find that he reported such retained income and did not wilfully understate the same, your verdict must be not guilty."

16. The Trial Court erred in refusing to charge the Jury as requested by counsel for the defendant as follows (N.T. 2064), to which an exception was taken:

"17. The jury are instructed that even if you find that the agreement between Johnson and the persons who paid him numbers money was illegal, the defendant was entitled to take as deductions from such money, such sums as he expended in carrying out the purpose for which the moneys were given."

17. The Trial Court erred in refusing to charge the Jury as requested by counsel for the defendant as follows (N.T. 2064), to which an exception was taken:

"18. The jury are instructed that the fact that the defendant did not report in detail the source of his gross receipts, the amount thereof, or the deduction, is not material to the issues with which you are concerned. He is not being prosecuted in this case for any deviation from official forms. The issue is whether he made a false return as to total net income and whether in so doing he is guilty of wilfully attempting to defeat and evade the tax. Accordingly I charge you that you are not to concern yourself with the form of the returns filed by the defendant, but are to determine this case in accordance with the instructions I have already given you."

18. The Trial Court erred in refusing to charge the Jury as requested by counsel for the defendant as follows (N.T. 2065), to which an exception was taken:

"19. Testimony has been produced that the defendant was subpoenaed to appear before the Grand Jury and that [fol. 2128] he refused to testify before that body. I charge you in considering the effect of such refusal you must consider that he acted under advice of counsel and that at the time he was called, the Grand Jury had already voted an indictment against him and that accordingly he was within his rights in refusing to answer any question in connection with his conduct."

19. The Court erred in the following portion of its charge, to which an exception was taken:

"In determining what the defendant's intent was you may take into account any evidence of concealment of fact by the defendant. In this connection you may consider the fact that his returns did not disclose the source of this money from the numbers men, nor the total amount thereof, nor the deductions claimed. You may also consider the testimony that he made no inquiry from anybody, including his accountant, as to whether the claimed deductions were allowable, and that he had no basis for his belief that they were allowable, although he knew that some deductions were not allowable."

"In this connection I charge that if you find that the defendant tried to mislead the government, its agents or investigators, you may consider whether such an attempt to mislead or conceal indicates a consciousness of guilt or guilt itself. You are to determine whether there was any misleading on the part of this defendant. That is a question of fact for you to determine."

20. The Court erred in the following portion of its charge, to which an exception was taken:

"On the other hand, you may believe that the items reported as commissions were not money from this numbers game, but really were commissions of some sort which have no connection with this numbers income. You may also consider the testimony of the defendant's secretary and accountant that they did not know that any of that money [fol. 2129] was from numbers."

21. The Court erred in the following portion of its charge, to which an exception was taken:

"The Government introduced evidence to prove that the defendant did receive from the numbers game $45,750 in 1935. The defendant concedes that he received this money and that he received $62,400 in 1936 and he admits receiving $50,400 in 1937. Since the defendant admits receiving these sums from the numbers game, he should have reported these sums on the face of his income tax return."

22. The Court erred in the following portion of its charge, to which an exception was taken:

"The fact that the defendant derived a substantial portion of his income during the years in question from illegal sources did not exempt him from making a return under oath for any of these years, stating specifically the items of his gross income and the deductions and credits allowed by the applicable revenue act.

"The purpose of the income tax return is to enable the Commissioner of Internal Revenue or his agents to determine if a correct tax has been paid. Accordingly, the receipts from the numbers game should have been reported by the defendant on his income tax return, just as the income from the Mays Landing Record and the American Oil Company."

23. The Court erred in the following portion of its charge, to which an exception was taken:

"The question which you are to consider is the state of the defendant's mind when these returns were made. He has testified directly as to what his state of mind was; consequently, the only way in which the government could establish the contrary is by showing circumstances or prior [fol. 2130] statements or acts by the defendant which tend to indicate that he did not, in fact, believe that he was entitled to the deductions in question. In this connection, the government points to the fact that in each of his income tax returns he described as commissions the moneys which he now says represented the net receipts from the numbers people. Then there is also the fact that in the three income tax returns in question he went into great detail in regard to many deductions from gross income derived from other

sources but completely failed even to disclose the fact that he claimed deductions in connection with the item which h*d* described as commissions."

24. The Court erred in the following portion of its charge, to which an exception was taken:

"There are two further questions to be considered in connection with these transactions that also bear upon the defendant's intent: First, did the item 'commissions' which the defendant reported actually represent a residue of numbers money or was it in fact income from some other source more properly described by the term 'commissions'? Defendant now testifies that these commissions were in fact numbers money and would even have you believe that he used the term 'commissions' in an attempt to conceal the true nature of this money. Does this show good faith? You may, from all the facts and circumstances, reach the conclusion that the defendant's statement under oath in his income tax return that these funds were commissions is the fact and that his present testimony is not true; that is entirely for you to say."

John Rauffenbart, Walter G. Winne, Benj. M. Golden, Attorneys for Defendant.

[fol. 2131] [File endorsement omitted.]

[fol. 2132] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

On Appeal

Indictment 390 C

UNITED STATES

vs.

ENOCH L. JOHNSON

PETITION FOR ORDER STAYING EXECUTION, ETC.—Filed August 2, 1941

To the Honorable, the Judges of the United States Circuit Court for the Third Circuit:

The petition of Enoch L. Johnson, a resident of the District of New Jersey, respectfully represents:

1. That he is the defendant-appellant in the above entitled case, wherein notice of appeal has been duly filed and served.

2. This appeal is from the judgment and sentence of the District Court for the District of New Jersey, entered on August 1, 1941, the said judgment was made on a verdict of "guilty" returned by a jury on July 25, 1941, after a trial on an indictment charging defendant with wilfully attempting to evade and defeat the payment of income taxes alleged to be due the United States Government. The alleged violations were for the calendar years 1935, 1936 and 1937. Upon the basis of said judgment, the Trial Court sentenced him to serve for a term of 5 years on the 2nd Count of said indictment and for a term of 5 years on the 3rd Count of said indictment. Said terms of imprisonment to run consecutively; $10,000 fine on each count and costs of prosecution.

3. Since the day of said sentence and by virtue thereof your petitioner has been detained at the Mercer County Jail in New Jersey in the City of Trenton, New Jersey.

4. On August 1, 1941, an application for bail, pending the appeal was made to Honorable Albert B. Maris, who was the Trial Judge, in the matter, sitting as a District Court [fol. 2133] Judge for the United States District Court. The said Trial Judge denied the application and an order of commitment was directed against your petitioner, who has been duly imprisoned in accordance with said order.

5. Your petitioner up to the time of the present judgment has never been convicted of any crime of any nature.

6. Your petitioner is advised and believes that substantial reasons exist for the filing of said appeal and that substantial reasons exist justifying the belief that the appeal may be successfully prosecuted on his behalf, and that substantial questions are involved which should be determined by the Appellate Court.

Your petitioner therefore prays for an order staying the further execution and enforcement of the judgment and sentence entered on August 1, 1941 by the District Court for the District of New Jersey and prays further for ad-

mission to bail upon the filing of bond as may be ordered until the final determination of this case.

Your petitioner will ever pray, etc.

Enoch L. Johnson, Petitioner, by Walter G. Winne of Counsel.

Duly sworn to by Walter G. Winne. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 2134] ORDER

Coram: Jones and Goodrich, Circuit Judges.

And now, to wit, August 2d, 1941, the within application for admission to bail and stay of execution is denied.

Jones, Circuit Judge.

Endorsements—

Order Denying Bail and Stay of Execution of Sentence.

Received and Filed Aug. 2, 1942.

Wm. P. Rowland, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

[Title omitted]

MINUTE ENTRY OF HEARING

And afterwards, to wit, the 21st day of November, 1941, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 30th day of June, 1942, come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 2135] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7795

UNITED STATES OF AMERICA,

vs.

ENOCH JOHNSON, Appellant

On Appeal from the Judgment and Sentence of the District Court of the United States for the District of New Jersey.

OPINION—Filed June 30, 1942

Before Biggs, Jones and Goodrich, Circuit Judges.

BIGGS, Circuit Judge.

Facts

The appellant was indicted upon an indictment consisting of three counts. Each count charged an offense against Section 145(b) of the Revenue Act of 1936, Act of June 22, 1936, c. 690, 49 Stat. 1648 which provides in part that "* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, * * * be guilty of a felony * * *". The appellant was charged respectively in the [fol. 2136] three counts with wilfully evading payment of income tax for the years 1935, 1936 and 1937. He was acquitted under the first count, was found guilty and sentenced on each of the two remaining counts.

The second count alleges that Johnson filed an income tax return for the year 1936 reporting a gross income of $29,958.19, but omitted the sum of $62,400 received from backers of numbers games. The count charges that the defendant attempted thereby to evade taxes in the amount of $19,957.30. The third count alleges that the appellant reported a gross income of $33,740.28 for the year 1937 but omitted the sum of $62,400 received by him from numbers backers. The count charges that he attempted thereby to evade taxes amounting to $18,759.10.

The facts are as follows. The appellant was a political leader in Atlantic County, New Jersey, residing in Atlantic City. He testified that he had occupied the position of county treasurer for many years but had devoted his time to politics. The evidence showed that in the latter part of 1932 or at the beginning of 1933 there were seven numbers banks or games operating in Atlantic City. Six of these banks operated in the daytime; one operated at night. These banks paid protection money to the appellant at the rate of $825 a week for approximately the first six months of 1935. About April 1935, Ralph Weloff and James Towhey, numbers backers, fell into a dispute. One Martin Michael, sometimes known as Jack Southern, ousted Weloff as Towhey's partner and took over the latter's numbers bank himself. Towhey tried to get the business back by giving higher odds on numbers, by cutting fewer numbers and by paying higher commissions to salesmen and runners. This precipitated a numbers war in Atlantic City. All the backers lost money, the struggle between them became "noisy" and attracted public attention. Arrests increased and business was lost. As a result all the numbers backers held a meeting and formed a single large partnership or syndicate into which they pooled their business. [fol. 2137] The syndicate was set up and began to function about July 1935. Its operations were highly successful.

This syndicate paid Johnson $1,200 a week. The payments began in July 1935, continued throughout the balance of that year, throughout 1936, and through at least the first ten months of 1937. The sums upon which the United States alleged the appellant had not paid income taxes for the years 1935, 1936 and 1937, are made up by the yearly totals of these weekly amounts.

Johnson stated the sums paid to him were not paid for the protection of the numbers bankers from police interference but in order to enable him to maintain his personal political machine; that he kept for himself the balance of the sums paid to him weekly after deducting therefrom certain political expenses; that the amounts of these deductions were set forth on slips which he sent to his office. He testified that when he made his tax returns for the taxable years with which we are concerned he reported as taxable the difference between the amounts received and the amounts paid out, designating the sums retained by him as

"commissions" or as "other commissions". Johnson also stated that he considered the sums deducted as properly deducted and that he had no intention of evading taxation.

Throughout Johnson's examination-in-chief his counsel carefully restricted his questions and Johnson restricted his answers so that neither questions nor answers embraced the months of November and December, 1937. Ralph Weloff, the paymaster for the numbers syndicate, was asked how long he continued "to take $1200 a week to Johnson?" In reply he stated his recollection "after talking it over with some of the backers and another man Jack Sothern who had established a different time, established a time in November, 1937 * * * that November 1937 was the right time."; viz., the time when he, Weloff, had ceased to take money to Johnson. Weloff's duties as paymaster for the numbers syndicate were assumed at about this time by Martin Michael, known also as Jack Southern. This person, [fol. 2138] whom neither side was willing to bring to the stand as a witness, was called by the presiding judge. His testimony was that he had paid no money to Johnson at any time.

Upon cross-examination and over objection the defendant was questioned as to how long he had kept up the practice which he had described in regard to the slips which he sent to his office. To this he replied, "During this period * * * '35, '36 and '37." Thereupon he was asked, again over objection, as to whether he continued to send slips to his office in the year 1938. He replied that he did do so throughout that year. An objection to a question as to what he did in this regard in 1939 was sustained as too remote. There followed a series of questions directed to the receipt of money and the keeping of records by Johnson in the years 1934 and 1936. Then occurred the following illuminating colloquy. Johnson was asked by government counsel, "How about 1937. Did you record $1200 weekly each week in 1937?" His counsel interjected: "Until November 1st." The counsel for the United States then said, "Now, that is the part I object to." The court's comment to Johnson's attorney was, "You are out of order on that. The objection is overruled. You are not answering for the witness. He is answering for himself." The defendant's counsel stated, "I am sorry, your Honor." The court said, "You might take your seat and permit the examination to

continue." The cross-examination continued, Johnson admitting that he had received money from Weloff "Up until the time Mr. Weloff stopped receiving the money." Then Johnson was asked, "Didn't you get that $1200 every week right up until the end of the year?" He replied, "No, sir." The next question was, "Didn't Jack Southern bring that money to you after Weloff stopped? Johnson again replied, "No, sir." The next day Johnson was asked, "Did you receive any money from numbers in 1938?"[1] The defendant's counsel objected but the objection was overruled. Johnson replied, "Yes, sir." He was then asked, "Who gave it to you?" His counsel then stated, "I object to that, if your Honor please. I think perhaps we should have argument upon this question because I can see what it is [fol. 2139] opening up if it is allowed to proceed. I think it is highly objectionable to inquire into a situation which, according to public newspaper articles is going to be the subject of another indictment against this defendant, quoting Mr. Burns. I think the defendant is entitled to be protected." The trial judge said that he desired argument upon the point raised and counsel for the defendant suggested that the jury be excused during the argument. The court thereupon excused the jury which withdrew from the courtroom. The prosecuting attorney then said, " • • • as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the courtroom during the argument and that when he resumes the stand he should do so without having any opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument." The court then said, "I think that is a fair request. You may retire, Mr. Johnson." While what Johnson did then is not described in detail in the record, the record does state that "the defendant withdrew". It is entirely clear from the ensuing colloquy of court and counsel that the defendant did not return to the courtroom until the jury was called back. This is also implicit in the briefs. During the course of the argument before the defendant returned to the courtroom, his counsel stated, " • • • I want to say that regardless of whether I am right in any of my other contentions • • • it

[1] Transcript pp. 736, 871, 875, 1503-1504a, 1506-1507.

[the question asked of the appellant, viz., "Who gave it to you?"] is an attempt on the part of the government to force from the witness who is not immune from testifying as to things which are on trial here before the court, but who has the same immunity as any one else from testifying from any other thing than that which is on trial before the court, [sic] that this is an improper cross examination for the reason that it is directed to a future prosecution." After further argument the trial judge stated, "You may advise him of his rights, of course, but it is for him to determine whether or not he wishes to take advantage of them * * *". Further argument took place and the [fol. 2140] trial judge finally said to counsel for the defendant, "I will allow you an exception. I will permit you, after the question is asked, to advise him about his rights." The right to which the trial court and the appellant's counsel referred was the appellant's right under the Fifth Amendment not to be compelled to give testimony against himself.

When the jury was called back the defendant resumed the witness stand. The question, "Who gave it to you?" was repeated to him. The defendant was informed of his constitutional rights by his counsel and immediately he claimed a right not to answer the question. He was also asked, "What fund did you use during November and December of 1937 to pay these expenses that you had been paying out of this fund?" The witness answered, "Money that had been accumulated." He was then asked, "What money did you use in 1938 for that purpose?" The witness declined to answer the question, again purportedly taking advantage of his constitutional rights. The prosecuting attorney then showed Johnson an exhibit which was his income tax return for the year 1938 and the defendant was asked to identify the document. Again his counsel objected, but the objection was overruled. The defendant replied, "My income tax return for 1938". He was then asked "* * * did you have an item of 'other commissions' for the year 1938 as part of your income?" The defendant again claimed privilege. Then came a question: "What money did that represent?" Johnson replied, "I refuse to answer on the grounds that I do not have my records here, and on my rights under the Constitution." The court then said to him, "You may decline to answer upon

the ground that it might tend to incriminate you, not upon the ground that you do not have your records here. You might say that you do not know if that is a fact." Johnson replied, "All right; I refuse to answer as it tends to incriminate me." This was the end of this line of cross-examination.

[fol. 2141] THE LAW

Did the Court Commit Reversible Error by Excluding Johnson from the Courtroom?

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of liberty without due process of law and the Sixth Amendment guarantees a speedy and public trial with the right of confrontation [2] to every defendant in the courts of the United States. The leading criminal case on what constitutes due process under the Fourteenth Amendment is Snyder v. Massachusetts, 291 U. S. 97. We think that this decision must guide us to our conclusion in the case at bar since the Supreme Court held in Hurtado v. People of California, 110 U. S. 516, 535, that the phrase "due process of law" used in the Fourteenth Amendment to restrain action by the states means substantially the same as that phrase of the Fifth Amendment, restraining action by the federal government. See also Twining v. New Jersey, 211 U. S. 78, 101; Powell v. Alabama, 287 U. S. 45, 66; Chambers v. Florida, 309 U. S. 227, 235-236 and compare Grosjean v. American Press Co., 297 U. S. 233, 245. In view of the exhaustive citation of authorities in both the majority opinion of the Supreme Court by Mr. Justice Cardozo and in the dissenting opinion

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[2] The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

of Mr. Justice Roberts in the Snyder case, there is no point in this court embarking upon a lengthy reiteration of the authorities.

In Snyder v. Massachusetts, Snyder who had been found guilty of a murder growing out of an attempted robbery, contended that he had been deprived of due process of law under the Fourteenth Amendment because when the jury [fol. 2142] had viewed the scene of the crime pursuant to the provisions of Section 35 of Chapter 234 of the General Laws of Massachusetts he had not been present. The Supreme Judicial Court of Massachusetts affirmed the conviction, 282 Mass. 401, 185 N. E. 376 and the Supreme Court of the United States refused to reverse the judgment of the Supreme Judicial Court of Massachusetts.

After referring to Twining v. New Jersey, supra, pp. 106, 111-112, in which the privilege against self-incrimination was withdrawn, and Hurtado v. People of California, supra, where a defendant was tried for a capital offense upon an information rather than an indictment, Mr. Justice Cardozo stated the essence of due process of law as follows, p. 105, "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it." Mr. Justice Cardozo then went on to say that a defendant's privilege to confront his accusers and cross-examine them face to face is guaranteed to him by the Sixth Amendment in prosecutions in the federal courts, citing Gaines v. Washington, 277 U. S. 81, 85, and that his defense may be made easier if he is permitted to be present while jurors are being examined or counsel are summing up to the jury. His presence will enable him to advise his counsel or if he wishes, to supersede his counsel and to conduct the trial himself. Mr. Justice Cardozo then went on to say, "In all the cases thus assumed the presence of the defendant satisfies the test that was put forward a moment ago as basic and decisive. It bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." The test thus laid down by the Supreme Court is a very plain one. In the opinion in the Snyder case Mr. Justice Cardozo also stated, pp. 107-108, "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." The Supreme Court points

out that motions before trial are heard in the defendant's absence, as are many motions made after trial or in the prosecution of appeals.

[fol. 2143] The question which we have before us in the instant case is one which is extremely difficult to answer. Obviously it is not necessary for a defendant to be present at every stage of the proceedings against him. Due process does not require him to be in court when a true bill is returned against him by a grand jury or when his appeal is argued in the appellate court. See Dowdell v. United States, 221 U. S. 325, 331. The defendant must be in court when jurors are challenged. Hopt v. People of Utah, 110 U. S. 574, 579. Certainly the defendant must be present when the jury is in the box and the trial is in progress. The defendant must be deemed to have the absolute right to hear everything which the jury hears if he is to protect himself. Under such circumstances his presence bears a relation "reasonably substantial, to his opportunity to defend". To exclude him from the court room upon such occasions would be to hazard his constitutional rights upon the theory an appellate tribunal might save him from jeopardy. He must be present when the jury is present and is receiving evidence. If he is, then the trial meets the substance of the stringent test laid down by Mr. Justice Roberts in his dissenting opinion in the Snyder case, p. 129. Mr. Justice Roberts stated that the prisoner's constitutional right of presence "• • • comprehend[s] the inquiry by the ordained trier of fact from beginning to end", citing Hopt v. Utah, supra; Lewis v. United States, 146 U. S. 370, and Diaz v. United States, 223 U. S. 442. In the instant case it appears that the defendant was present at all times that the jury was present and his absolute constitutional right of presence was not infringed.

Johnson' exclusion took place when the jury was absent and a point of law raised by his counsel was argued. We can find no federal decision precisely in point. The case which supplies the nearest parallel to the case at bar is that of Adams v. the State of Florida, 28 Fla. Reports 511, 10 So. 106, where the jury had been sent from the courtroom during argument and Adams was returned to jail. In that case it was flatly held that the defendant had, "• • • the right to be present and to hear questions [fol. 2144] of law as well as questions of fact discussed,

and in fact no steps can be taken in the case in his absence." A somewhat similar decision was reached in Tiller v. State, 96 Ga. 430, 23 S. E. 835. In this case Mr. Justice Lumpkin stated, "It cannot be doubted that the argument of counsel is a stage of the proceedings, for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage, as affecting the accused, is obvious; it being a matter of vital concern to him to see and hear everything done and said, both for and against him, as the trial progresses."

The decisions just cited seem to us to go too far. If followed to their logical end great difficulties would be encountered in the practical conduct of a trial. The rule was stated by Mr. Justice Cardozo in the Snyder case, p. 114, as follows, "A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel * * * and cross-examine his accusers", citing Powell v. Alabama, supra; Dowdell v. United States, supra; Commonwealth v. Slavski, 245 Mass. 405, 140 N. E. 465. In other words, applying another test stated by Mr. Justice Cardozo, the presence of a defendant is a condition of due process only "to the extent that a fair and just hearing would be thwarted by his absence * * *." The test, therefore, the jury, the triers of fact being absent from the courtroom, must be whether or not the appellant was damaged by not being present. An examination of the record convinces us that he was not. The question which was argued was purely one of law. We think that the trial court correctly resolved it for the reasons which will appear more particularly hereafter. Upon the return of the appellant to the courtroom he was warned of his constitutional immunity and claimed it immediately. As we have previously indicated, the right of a defendant to be present when the triers of fact are absent is not an absolute right, but one qualified by a condition that nothing occurs when he is not present which could put him in jeopardy. Only thus would [fol. 2145] his presence bear a relation "reasonably substantial, to his opportunity to defend."

Counsel for the United States makes much of the fact that when the appellant went on the stand he acquired another capacity; he remained a defendant but he became a witness. A defendant who becomes a witness waives

his constitutional privilege against self-incrimination as to the crime with which he is charged. Raffel v. United States, 271 U. S. 494. Waiver of privilege by a defendant is discussed at length in 8 Wigmore on Evidence, 3rd Ed., §§ 2276 et seq. and we do not need to repeat here what is said there. The government contends that when Johnson offered himself as a witness he waived any constitutional privilege which conflicted with that role. We cannot agree with this contention. There is ample authority for the proposition that a defendant when he goes on the witness stand waives constitutional rights otherwise retained. For example, he waives his privilege as to self-incrimination. He must answer questions as to facts according to the rules which are imposed on him in the jurisdiction in which he is being tried. There are half a dozen different rules which may govern the giving of his testimony. They need not be stated here. See Wigmore on Evidence, supra. But in the case at bar we are not concerned with what testimony a defendant who takes the stand must give but with the fact that the defendant was absent from the courtroom at a stage of his trial. We cannot justify the exclusion of the defendant from the courtroom in the case at bar on the ground that he was a witness. For whatever additional capacity or capacities a defendant may acquire during the course of his trial he remains a defendant throughout the entire course of his trial until, the jury returning a verdict of not guilty, the court has entered judgment upon that verdict. The argument of the prosecuting officer based upon the appellant's capacity as a witness is an ingenious one, but we cannot accept it. Its acceptance would open the door wide to abuse and the abrogation of rights guaran- [fol. 2146] teed by the Fifth and Sixth Amendments to the Constitution of the United States.

We prefer to base our conclusions on what we deem to be safer ground. We lay down the rule for this circuit that a defendant must be present in the courtroom at every stage of the proceeding which requires the presence of the jury. This is an absolute right. He should also be present at every other stage of his trial, from the time the first veniremen is called to the box until judgment is rendered by the court upon the verdict of the jury. If he is not present when the triers of the facts are not present but argument is being had before the court during the couse of his trial,

he must be deemed to be entitled to a new trial if it be found that any of his rights have been endamaged by his absence.

In the case at bar it should be noted that neither the defendant nor his counsel made objection to the direction of the trial judge that he leave the courtroom during the argument upon the propriety of the question which had been put to him as a witness. The record is full of other instances of vigorous objection by the defendant's counsel. We think that the defendant acquiesced in the trial judge's direction to him to withdraw from the courtroom. No objection was made at the time the trial judge gave the direction. It was not made the basis for any motion following the judgment of conviction. It was not advanced to this court as a ground for the enlargement of Johnson upon bail. It was asserted first in the argument upon appeal. We state these facts despite our conviction that in the application of constitutional rights technicalities have no place, for we think the facts tend to confirm our conclusion that the defendant took no harm from his exclusion from the courtroom during the argument.

[fol. 2147] Did the Trial Court Err in Permitting Questions and Evidence as to Money Received by the Appellant in 1938?

We have set out some of the questions and answers pertinent to this inquiry in our discussion of the first point. We need not reiterate them now.

The question of whether or not Johnson had received money from the numbers backers in the last two months of 1937 was pertinent to the issues presented by the indictment in the case. As we have stated Martin Michael, sometimes known as Jack Southern, had testified that he paid no money to Johnson after he, Michael, took over the office of paymaster for protection of the numbers banks. Johnson on cross-examination asserted that he had received no money from the numbers backers in the latter part of the year 1937. Thereafter on cross-examination, as we have already indicated, he was asked whether he had received money from the *the* numbers backers in 1938 and admitted that he had done so.

We can perceive no error in questioning the defendant in detail as to what he did with respect to his income tax return for the year 1937, whether he received money in 1938

from the numbers game, from whom he received it, and what he did with it. These questions properly were designed to test the credibility of the defendant's original statement that he did not receive money from the numbers backers in the last two months of 1937 for it places some strain upon credulity to suppose that the payments made to him for protection over a period of years were suddenly halted for two months within the time covered by the indictment only to be resumed by Johnson's own admission immediately thereafter. As a matter of fact, upon cross-examination, Johnson had already testified, without any objection from his counsel, "• • • when I got ready to send every month or few months, I would send memorandums up showing what my net income was during that period; they would be filed until I made up my income tax." Further cross-examination as to the duration of this practice within the [fol. 2148] time limits of the indictment was entirely proper. This was recognized by defendant's counsel in his objection to the question, "And how long did you keep up that practice?" Johnson's counsel in explaining his objection to that question stated, "I want to urge that nothing after the date, the end of 1937 is admissible. • • •" The incongruity between the admission by Johnson of his continuing to send slips from which his income tax returns were made up to his office throughout the whole of 1937 and the testimony as to the alleged non-delivery of money to him during the last two months of that year is manifest. It throws into sharp relief the issue of Johnson's credibility which the questions of the cross-examiner were designed to test.

An examination of the transcript also discloses the whole extraordinary story told by the appellant to the effect that $1,200 was delivered to him weekly; that he kept slips showing the net sums remaining in his hands after he had deducted the expenses of his personal political machine and that he returned the balance in 1935, 1936 and 1937 as "commissions" or "other commissions". The appellant was in fact testifying to a system which he said he pursued in making up his income tax returns. He gave this information in the course of his examination-in-chief by his own counsel. It was perfectly proper in our opinion to permit cross-examination within reasonable limits as to the system pursued by him in years prior and subsequent to the taxable years in question. This also constituted a proper test of the appellant's credibility. See Benness v. United States, 20

F. (2nd) 754; Tinkoff v. United States, 86 F. (2nd) 868, cert. den. 301 U. S. 689; United States v. Dalhover, 96 F. (2nd) 355; Cravens v. United States, 62 F. (2nd) 261, cert. den. 289 U. S. 733; Alderman v. United States, 31 F. (2nd) 499, cert. den. 279 U. S. 869; and Madden v. United States, 20 F. (2nd) 289.[3] We cannot conclude that the trial [fol. 2149] court erred in the exercise of its discretion in permitting the cross-examination here in issue. Gowling v. United States, 64 F. (2nd) 796; Silverman v. United States, 59 F. (2nd) 636, cert. den. 287 U. S. 640; Hewitt v. United States, 110 F. (2nd) 1, cert. den. 310 U. S. 641. Compare United States v. Reed, 96 F. (2nd) 785, cert. den. 305 U. S. 612; United States v. Waldon, 114 F. (2nd) 982, cert. den. 61 S. Ct. 549.

But quite apart from the foregoing, the witness answered but three questions over objection; as to the others he claimed his privilege against self-incrimination. The learned trial judge probably erred in Johnson's favor in allowing him to claim his privilege to avoid testifying upon material issues when he had submitted himself as a witness. But this worked in Johnson's favor. The fact that he claimed privilege cannot be deemed to have prejudiced him. There

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[3] It should be noted that the common law of New Jersey as it existed prior to the enactment of the Judiciary Act of 1789 is not controlling here. Wolfle v. United States, 291 U. S. 7; Funk v. United States, 290 U. S. 371; Note (1934) 47 Harv. L. Rev. 853. The New Jersey decisions are to the same effect, however. State v. Barth, 114 N. J. L. 112, 176 A. 183 (Ct. Err. App.); State v. Von Der Linden, 105 N. J. L. 618, 147 A. 636; State v. Grover, 104 N. J. L. 10, 139 A. 417 (Sup. Ct.); State v. Bassone, 109 N. J. L. 176, 160 A. 391 (Ct. Err. & App.); State v. Sutherland, 123 N. J. L. 513, 9 A. (2nd) 807 (Sup. Ct.), affirmed on opinion below, 125 N. J. L. 273 15 A. (2nd) 749 (Ct. Err. & App.).

See also the recent decision of this court in United States v. Montgomery, 126 F. (2nd) 151, cert. den. — U. S. —. We stated, p. 154, "It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the light of general authority and sound reason."

is no authority for holding that because a defendant in his capacity as a witness claims his constitutional privilege against self-incrimination that he is prejudiced thereby. In Raffel v. United States, supra, p. 497, the Supreme Court stated that when a defendant takes the stand in his own behalf "• • • he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined as to the facts in issue. • • • His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." The privilege has been described as "• • • an *option of refusal*, not a prohibition of inquiry." 8 Wigmore on Evidence, 3rd Ed., [fol. 2150] § 2268, p. 388. See also O'Connell v. United States, 40 F. (2nd) 201, certiorari dismissed 296 U. S. 667.

That the defendant would have incriminated himself by answering the questions which were asked him extremely unlikely. The trial judge applied the privilege very liberally in his behalf. But in any event Johnson gave no answer to any question which might have incriminated him and therefore he has taken no hurt. We conclude that no further discussion is necessary upon this point.

As to Argument by the Prosecuting Attorney and the Sufficiency of the Court's Charge

In arguing to the jury the prosecuting attorney stated, "Now, ladies and gentlemen, can you believe that man [the defendant] told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from on the ground that it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground it would incriminate him, well, then, I just don't get it." The court in his charge to the jury, after objection by the appellant's counsel, stated the following, "Mr. Burns also referred to the fact that Mr. Johnson in cross-examination when asked with regard to whom he received numbers money from in 1938, claimed his constitutional privilege of not being required to answer a question which he felt might tend to incriminate him. Now, that may only be considered by you in testing his credibility as to the answers which he

did give and his good faith in the matter. We are not trying Mr. Johnson for anything that he did in 1938, that is not before you, that is an entirely different matter with which you or I have not any concern whatever. We are only considering in this case the years 1935, 1936 and 1937. In so far as any suggestion was made by Mr. Burns that that [fol. 2151] might be considered for any other purpose, you should disregard it." The appellant takes the position that the trial judge in stating this interpretation of the applicable law did not correct the prosecuting attorney's error, but rather accentuated it. The appellant contends that the trial judge in effect stated that when the appellant claimed his constitutional privilege that might be considered by the jury in testing his credibility in regard to the answers which he did give. This is really what the trial judge charged.

Was the trial judge in error in charging the jury that in testing the appellant's credibility and good faith it might consider the fact that he refused to answer questions in regard to the year 1938 upon the ground that to do so would incriminate him? We can perceive no reason why the fact that a defendant refuses to answer pertinent and proper questions upon cross-examination should not be considered by the jury in testing his good faith and credibility. Certainly the implication that the jury may consider the defendant's refusal to answer questions upon the ground of self-incrimination, as a test of credibility is contained in Raffel v. United States, supra, p. 497. As was stated, in the Raffel case, when a defendant takes the stand in his own behalf he does so as does any other witness. Since such is his position the jury is entitled to draw the inference if the facts warrant it that a defendant is claiming privilege in bad faith, not because he seeks to avoid admission of guilt of a crime with which he is charged and for which he is not being tried, but to avoid the embarrassing consequences of truthful answers at the trial at which he is testifying. In view of the questions asked Johnson and which he refused to answer under his claim of privilege, we think the trial court committed no error in instructing the jury that they might consider the defendant's good faith and credibility in asserting his privilege.

The trial was a protracted one. At times a considerable degree of heat was engendered between counsel. During

their respective summations both the attorney for the defendant and the attorney for the United States went further [fol. 2152] than the rules of fair argument would allow. Since the defendant was convicted, it is not necessary to deal specifically with any parts of the closing speech of the defendant's counsel. We wish, however, to point out certain language used by the prosecuting attorney in his summation and expressly to condemn it. He stated, "The acknowledgment of this defendant that he openly violated the laws of the State of New Jersey for all these years cannot leave any other decision in your mind but that he willingly and intentionally violated the income tax laws of this country." This argument is a complete non sequitur. It is unfair because it contends that when a man admits that he is guilty of a crime he therefore must be deemed guilty of another crime.

The prosecuting attorney also argued to the jury "* * * that that defendant had dragged the Republican Party of Atlantic County down into the mire * * *" and that the jury should save the people of Atlantic County from the disgrace of having Johnson as their leader. It is only fair to say that the attorney for the government at this juncture was endeavoring to counteract certain extreme statements made by the defendant's counsel. This is no excuse, however, and the argument which we have just referred to should not have been made. The jury represented a fair cross-section of the local community and we cannot conclude that, inured as is this part of the United States to the ordinary language of politics that the members attached any great importance to the argument.

We conclude that what the prosecuting attorney said to the jury would not warrant a new trial. The charge of the court was fair and adequate and carefully calculated to counteract the improper arguments of both counsel.

We have examined the transcript in this case. We have considered all of the objections raised by the appellant. We can perceive no error in the record sufficient to justfy a reversal of the judgment of conviction. The appellant received substantial justice.

The judgment will be affirmed.

[fol. 2153] CONCURRING OPINION

GOODRICH, *Circuit Judge*, concurring:

The affirmance of the judgment of the trial court in this case seems to me correct. However, I believe the rule laid down concerning the right of the defendant to be present in court is somewhat overelaborate and, therefore, a possible source of misunderstanding. In Snyder v. Massachusetts, supra, at p. 129, Mr. Justice Roberts, speaking for the dissenters, said: "The trial as respects the prisoner's right of presence in the constitutional sense, does not include the formal procedure of indictment or preliminary steps antecedent to the hearing on the merits, or stages of the litigation after the rendition of the verdict, but does comprehend the inquiry by the ordained trier of fact from beginning to end." (See also similar language p. 132.) The basis of dissent was that the majority said that due process of law was not violated when the defendant got something less than this, but neither majority nor minority held that he should be given more. This is what the defendant, here, seeks when he complains of his absence during a discussion of a question of law in the courtroom when the jury was not present. It seems to me there was no violation of constitutional guarantees in this.

DISSENTING OPINION

JONES, *Circuit Judge*, dissenting:

As I view the record in this case, the government's cross-examination of the defendant so far exceeded the bounds of proper interrogation as, veritably, to work a denial of the fair trial to which the accused was entitled. If such is the case, then nothing less than a new trial can suffice to eradicate the harm of the error for it goes to a matter of substantial rights.

The indictment upon which the defendant was tried specifically charged him with willful and fraudulent evasion of taxes on his income for the years 1935, 1936 and 1937, *and for no other year*. Despite the permissible limits to [fol. 2154] pertinent trial inquiry thus set by the indictment, government counsel essayed (and was permitted over

objection) to cross-examine the defendant with respect to his receipts of certain income and his return thereof for the year *1938*, a year wholly unrelated to the charges in issue. The impropriety of this action and the further trial error to which it directly led will become the more apparent upon further reference to the record.

The government in its case in chief proved by members or representatives of a syndicate of "numbers writers" (lottery operators) that they had given the defendant (a political figure of apparently considerable power with local civil officers) a specified sum of money each week of the three years covered by the indictment down to November 1, 1937, for the purpose of securing "protection" against police interference with their "numbers" operations. It was the government's further contention that the tax returns filed by the defendant for the years in question failed to reflect or account for the moneys so received by him.

The defendant, as a witness in his own behalf, admitted his receipt of the moneys from the "numbers writers" in the amounts and over the periods of time as proven by the government's witnesses. He further testified that the money had been given to him as contributions to aid him in maintaining his political organization and that, after making certain disbursements therefrom for political purposes, he had accounted for the residue in his respective income tax returns for the relevant years in a net lump sum designated "Commissions". Albeit the defendant thus ascribed to himself innocent motives in his receipt and disposition of "numbers" money, the effect of his testimony was none the less to admit, without any variation, the government's proofs as to the defendant's income receipts for the years covered by the indictment. And so, the facts with respect to the "numbers" source of the defendant's income for 1935, 1936 and 1937 were, for all practical purposes, removed from dispute by the defendant's admissions. At the same time, the defendant had not been asked in direct [fol. 2155] examination, nor did he then testify, with respect to his income for any years other than those specified in the indictment.

Nevertheless government counsel, for the avowed purpose of impeaching the defendant's credibility, asked him in cross-examination whether he had received moneys from the "numbers writers" in the year 1938. This was promptly

objected to by defendant's counsel as improper in that it served to inject collateral matter which could not be availed of by the cross-examiner as the basis for impeachment, and, further, in that it introduced facts tending to show an additional criminal charge (under the government's own theory) not covered by the indictment upon which the defendant was then being tried. The defendant further pointed out that the testimony of a government witness in the case had already disclosed that the defendant's income tax return for the year 1938 was at that very time the subject matter of a separate investigation by government agents. As a corollary, the defendant urged that, obviously, he had legally sufficient reason not to testify with respect to income matters for the year 1938, for which he might possibly be indicted later.

The learned trial judge permitted the cross-examination on the theory that the matter inquired about (the defendant's receipt of "numbers" money in *1938*) and a possible answer to an anticipated succeeding question as to whether the defendant had reported as "Commissions" in his income tax return for 1938 any receipts of "numbers" money in that year would go to affect his credibility either by contradicting him on the actual basis of his 1938 tax return depending upon what he testified with respect thereto, or by casting doubt on his testimony with respect to his tax returns for 1935, 1936 and 1937 if it should develop that he had not returned in similar manner for 1938 moneys received from like sources in that year.

It is less than clear to me how the matter thus inquired about can be deemed capable of serving as the basis for impeachment. Necessarily, even a possibility of refutation would depend upon how the defendant testified in such regard. If he told the truth, he could hardly be thought to [fol. 2156] have impeached himself even though a conflict should incidentally develop upon a comparison of his testimony with extraneous matter. Yet, the irrelevant matter, which on the government's theory would constitute a separate offense for which the defendant was not on trial, would have been heard by the jury. On the other hand, if he testified falsely, the government would not be in position to refute him, for the cross-examiner is bound by the answers which he elicits to questions concerning collateral matter.

In Cohen v. United States, 56 F. 2d 28, 30 (C. C. A. 1), where the circumstances were sufficiently similar to the present as to render the language of the court in that case pertinent here, Judge Bingham said (p. 30):

"Then, again, the course pursued in the cross-examination of the defendant was wholly improper and prejudicial. The subject-matter then inquired into had not been alluded to in the direct examination. The inquiry related to an entirely immaterial matter arising two years or more after the occurrence of the crime charged, and had no possible relation to it. The government having, on cross-examination, elicited information as to the defendant's occupation and the work he had done the day before—immaterial matters—was bound by his answers. It could not then undertake to contradict him as to these matters, as was done, for the purpose of disparaging his credibility.

"If testimony in relation to an immaterial matter is elicited upon cross-examination, it is not open to contradiction for the purpose of disparaging the credibility of the witness."

Again, in Bullard v. United States, 245 Fed. 837, 840 (C. C. A. 4), where a defendant was on trial for illicit distilling, government counsel was permitted upon cross-examination of the defendant to interrogate him concerning certain offenses not covered by the indictment. Speaking for the Court of Appeals, Judge Knapp said (p. 840) that "We are not aware of any theory upon which this ruling can be [fol. 2157] defended. The subject-matter of the question addressed to Bullard [the defendant] was obviously collateral to the issue on trial and *the government was bound by his answer.*" (Emphasis supplied.) That the extraneous cross-examination in that case constituted reversible error was said to be "an unavoidable conclusion".

Here, the learned trial judge overruled the objection, and the defendant answered, admitting that he had received "numbers money" in 1938. Immediately thereupon, government counsel asked him "Who gave it to you?" Vigorous objection by defendant's counsel to this question led to argument during which the jury and the defendant were absent from the court room under circumstances which the majority opinion fully relates incidental to another question. In the end the trial court overruled the defendant's

objection to this question but suggested that the defendant could justify a refusal to answer such questions by pleading, if he were so disposed, a witness' privilege against self-incrimination. Of course, if the matter was relevant and proper, the defendant was not entitled to plead the constitutional privilege. When a defendant voluntarily offers himself as a witness, he waives his privilege against self-incrimination and may be cross-examined like any other witness within the limits of the appropriate rules of evidence. Raffel v. United States, 271 U. S. 494, 497. In fact, not even skillful guidance by his counsel in direct examination can save a defendant from relating fully under cross-examination all matter within his knowledge which is relevant and material to the case. Integrity for the oath, which he takes as a witness, to tell the whole truth, so contemplates. Indeed, the action of the learned trial court in according to the defendant, as a witness, a right to plead privilege against self-incrimination seems but a tacit recognition that the matter inquired about was collateral to the issues for, otherwise, the defendant was bound to answer.

Upon a resumption of the testimony the question—"Who gave it to you?"—was renewed and the defendant refused to answer, claiming privilege against self-incrimination. [fol. 2158] Then followed several other questions by government counsel concerning defendant's income practices and tax return for the year 1938. In each of these instances relating to the year 1938 the defendant refused to answer on the ground that to do so would tend to incriminate him; and the court accepted the plea as justification for the defendant's refusal to answer.

While, in general, one might reasonably conclude that it adversely affects a defendant's substantial rights to force him to the point of pleading privilege against self-incrimination in order to avoid answering questions which have no proper place in the case, and should never have been asked, we are not left merely to inference for a perception of the prejudice engendered in this case on account of the defendant's refusal to answer the questions respecting his 1938 income. The summation [1] of government counsel was

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[1] Government counsel thus argued to the jury,—

"Now, ladies and gentlemen, can you believe that man told you the truth about anything on the witness stand

a deliberate and unmistakable exhortation to the jury to find the defendant unworthy of credit because he had plead privilege against self-incrimination in order not to answer questions as to his 1938 income receipts. Counsel for the defendant made due complaint of this argument for the government, and the trial court undertook in his charge to the jury to offset its harmful effect. But, instead of neutralizing what government counsel had improperly thus argued to the jury, the learned trial judge actually gave the argument added weight by telling the jury that the defendant's refusal to answer questions concerning his 1938 income could "be considered by you [the jury] in testing his [the defendant's] credibility as to the answers which he did give and his good faith in the matter."

The majority of the court dispose of this by saying that they "can perceive no reason why the fact that a defendant [fol. 2159] refuses to answer pertinent and proper questions upon cross-examination should not be considered by the jury in testing his good faith and credibility." The answer to that conclusion is that, if the cross-examination is "pertinent and proper", a defendant witness gets no opportunity to refuse to answer either by pleading privilege against self-incrimination or otherwise. Cf. Raffel v. United States, supra. But having been allowed by the court so to plead in this case, surely the defendant did not thereby subject himself to impeachment merely because he exercised a privilege which the court, even though mistakenly, accorded to him. The majority concede that the trial court "probably erred" in permitting the defendant to refuse to answer on the ground of privilege against self-incrimination but say that "this worked in Johnson's [the defendant's] favor." If so, it was indeed a "favor" of less than doubtful value when government counsel was able to argue to the jury that the refusal to answer for the reason assigned constituted impeaching conduct and was sub-

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when he admits that he got numbers money in 1938 but won't tell you who he got it from on the ground it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground it would incriminate him, well, then, I just don't get it."

stantially confirmed in this argument by the charge of the court.

Nor do I think that Raffel v. United States, supra, contains any implication that a refusal to answer on a plea of self-incrimination may serve as a basis for impeachment. Under the decision in that case, the situation never arises where a defendant witness can plead privilege against self-incrimination. The Raffel case contemplates that the defendant witness will be interrogated "within the limits of the appropriate rules." And, to that extent, he is bound to answer all pertinent and proper questions. How, then, could a defendant as a witness lay himself open to any imputation for refusing to answer when he is legally incapable of so refusing? In any event, I am unwilling to accede to the view that one's permitted invocation of a constitutional privilege carries with it a legal stigma at any time.

In my opinion, it was substantial error for the trial court to permit government counsel, over objection, to cross-examine the defendant on the collateral matter relating to a possible separate offense which could not in any case afford [fol. 2160] a legal basis for impeachment and likewise error for government counsel to argue to the jury, uncorrected, a want of credibility in the defendant because of his plea of self-incrimination in refusing to answer questions as to the collateral matter. Either the defendant should have been required to answer or have been relieved from answering, depending upon whether the court ruled the questions proper or improper. But he should not be held to have impeached himself by refusing to answer on a basis advanced and accepted by the trial court.

In the opinion overruling the defendant's motion for a new trial the court below gave a further reason in support of the questions asked of the defendant in cross-examination as to his 1938 income receipts from "numbers money". The argument is there made that as the defendant denied having received any payments from the "numbers" operators in November and December 1937, his admission of such receipts for the first ten months of 1937 and like admission as to 1938 warranted the jury in inferring that he had received similar payments in November and December 1937. In view of the fact that the government's own proofs did not show that the defendant had received any such payments in November and December 1937, the

suggested inference would be no more than a guess and, at that, a guess which would not even tend to corroborate any evidence in the case.

In concluding that the defendant is entitled to a new trial, I am not unmindful of the statute which requires that the trial error justifying reversal must be other than technical errors or defects which do not affect the substantial rights of the parties. Act of Mar. 3, 1911, c. 231, §269, as amended by the Act of Feb. 26, 1919, c. 48, 40 Stat. 1181. 28 U.S.C.A. §391. The errors to which reference has already been made did affect the substantial rights of the defendant. Cf. Williams v. Great Southern Lumber Co., 277 U.S. 19, 26.

In no event was the amendment of February 26, 1919, intended to, nor does it, invest a court with power to affirm a judgment merely because the court happens to divine that the jury was unaffected by the particular error and that the [fol. 2161] verdict would have been the same had the error not been committed. Any assumption of such power can stem only from an unwarranted emphasis upon the "technical error" portion of the statute without regard for the effect of the error upon the substantial rights of the complaining party. True enough, the crucial thing, which makes the amendment of Feb. 26, 1919, applicable in any case, is that the error assigned is technical or, as has been aptly said, is concerned with "the mere etiquette of trials, with the formalities and minutiae of procedure". See Bruno v. United States, 308 U.S. 287, 294. Such, indeed, are the conditions which call into play the court's exercise of its duty to say whether the error, being technical, affected substantial rights. But, where substantial rights are affected by trial error, the law forthwith imputes to the error the harm which renders the resultant judgment a nullity, regardless of the form of the error. McCandless v. United States, 298 U.S. 342, 347-348; Williams v. Great Southern Lumber Co., *loc. cit.* supra; United States v. River Rouge Improvement Co., 269 U.S. 411, 421.

This rule is no less applicable to criminal trials where jeopardy of life or limb is involved. Criminality is to be tried and adjudged according to legal standards which should be as fixed and unvarying in their general application as is humanly possible. Such, however, would not be the case if a finding of guilt may be affirmed according to the predilection or whim of any one person. Even judges

may not spy out guilt unerringly or appraise with certainty just what enters into a jury's deliberations in arriving at a verdict. Except where a jury trial is expressly waived, the facts and inferences should be left with the jury.

It may very well be that the defendant in this case is guilty of the offenses precisely as charged by the government, but the appropriate function of a reviewing court is to determine whether applicable legal standards were fully and fairly complied with at trial in respect of the defendant's substantial rights. Nor may the notoriety of a particular defendant ever dissuade from a dispassionate in-
[fol. 2162] quiry into the merit of his timely complaint. While, quite understandably, any question as to the fairness of a trial is of immediate and direct concern to the convicted defendant, its wider importance lies in its significance to the public at large. The rights of all are adversely affected when the rights of one are substantially impaired or disregarded. And this is especially true if the impairment or want of regard transpires under legal forms.

The conclusion herein reached renders unnecessary discussion or consideration of the exclusion of the defendant from the court room during the argument on the question of evidence in respect of the government's cross-examination of the defendant. However, it may not be inappropriate to say that I, too, deem a defendant's right to be present throughout his trial to be absolute. Any discriminations or refinements as to what does or does not constitute the trial, once the jury is impanelled, the verdict unreturned and the court in session and actually engaged in a disposition of the matter, are likely only to render that right something less than absolute. Furthermore, I think it is immaterial whether the defendant, when directed by the court to retire from the court room, departed without objecting. It is imputing responsibility rather summarily to say that a defendant's unquestioning compliance with a court's order at trial implies his acquiescence in the propriety of the order. Any waiver implied from the defendant's submission under the circumstances should not be invoked to dissipate a constitutional right. Cf. Hopt v. Utah, 110 U.S. 574, 579.

A true Copy. Teste:

——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 2163] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7795

UNITED STATES OF AMERICA

vs.

ENOCH L. JOHNSON, Appellant

JUDGMENT—Filed June 30, 1942

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

John Biggs, Jr., Circuit Judge.

June 30, 1942.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2164] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed October 27, 1942

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that for the consideration of his case on the writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted October 12, 1942, the printed record may consist of the following:*

---

* [Note: "R." refers to page of record filed with petition for writ of certiorari. "Tr." refers to page in stenographic transcript. "Q." includes answer following, except where specifically noted otherwise.]

Docket Entries, R. 1-6.
Indictment, R. 67-79.
Bill of Exceptions.
Witnesses:

Maie Paxson. Direct Examination: Tr. 241 Q. 1-Q. 4, incl.; 243 Q. 5; 243a all; 244, Q. 1-5; 246 all except first line; 247 Q. 1, 7; 248 Q. 1, 3, 5, 6; 249 all; 250 Q. 1-3, 7; 251 Q. 2-7; 252 Q. 2, 3.

John M. Bewley. Direct Examination: Tr. 259 all; 259a all; 260 Q. 1, 8; 261 all; 262 Q. 2 to 268 "Mr. Burns: That is all."; 271 Q. 2.

[fols. 2165-2166] Maie Paxson, recalled. Direct Examination: Tr. 277-281 all; 282 from top of page down to, but excluding, last question; 286 Q. 1; 287 all; 288 from top down to, but excluding, paragraph "Mr. Winne"; 289 Q. 1; 290-293 all.

Benjamin Ravinsky. Direct Examination: Tr. 678 Q. 6, 7; 679 Q. 1; 688 Q. only; 689-690 all; 692 Q. 2-4; 693 all; 694 Q. 1; 696 Q. 1-5.

Ralph Weloff. R. 79-114.

Benjamin Ravinsky, recalled. Tr. 822 Q. 2 to 823, Q. 5 incl.; 829 all; 830 A. 1.

Discussion: Tr. 865 L. 2 to 8; 868 L. 5 to L. 13.

Martin Michael. Tr. 871 to 887, inclusive.

Benjamin Rubenstein. Direct Examination: Tr. 898 Q. 5, 6; 899 Q. 1, 2; Cross Examination: Tr. 900 Q. 8 to 904 Q. 3, incl.

Herndon Daniels. Direct Examination: Tr. 929 Q. 4, 5; 934 Q. 1 to 935 L. 3.

Leroy B. Williams. Direct Examination: Tr. 973 Q. 4 to 974 A. 1; Tr. 975 Q. 2, 3.

William Sheppard. Direct Examination: Tr. 996 Q. 5, 11 "* * * What kind etc." 12; 997 A. 1 only; 1001 Q. 2 "Did you see any policemen etc." and A. 2 Q. 3 only; 1002 L. 9 to bottom of page; 1003 all; 1004 all Q. and A., not discussion; 1005 Q. 1.

James F. Towhey. R. 115-136.

Discussion: Tr. 1113-1114 all; 1115 top to L. 18.

Enoch L. Johnson. R. 137-233.

William B. MacDonald. Direct Examination: Tr. 1773 Q. 1; 1774 A. 1, Q. 6, 7; 1776 Q. 1; 1778 (G-5a and G-5b for identification received in evidence), Q. 2, Q. 4; 1779 A. 1 "Mr. Burns: I offer G-4a and G-4b for identification in

evidence." The Court: Admitted in evidence."; 1780-1783 all; 1784, from top to, but not including, paragraph beginning "Mr. Winne".; 1784-87 Q. and A. in quotations; 1789 all Q. and A.; 1790-1791 all.

[fol. 2167] Summation:

Tr. 1874 last 4 lines; 1875 first 3 lines.

Tr. 1912 L. 4 "I asked him * * *." to 1915 L. 15.

Tr. 1943 L. 4 to L. 16.

Tr. 1949 L. 13 to bottom of page.

Tr. 1949a all; 1950 all; 1951 lines 1 to 15.

Tr. 1963 L. 12 to bottom of page; 1964-5 all; 1966 L. 1 to 8.

Tr. 1972 L. 19 to bottom of page; 1973 L. 1 to L. 7 "start this morning. * * *"

Charge of Court, R. 6-38.

Motion for new trial.

Oral opinion denying motion for new trial, R. 39-41.

Judgment, R. 6.

Notice of Appeal.

Additional Ground of Appeal.

Assignment of Errors.

R. 235-267.

It is further agreed that in the briefs for either party reference may be made to any portion of the transcript of record which is not included in the printed record prepared as aforesaid.

William A. Gray, Counsel for Petitioner. Charles Fahy, Solicitor General of the United States, Counsel for the United States.

Dated this 23 day of October, 1942.

[fol. 2168] [File endorsement omitted.]

[fol. 2169] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 46,774. U. S. Circuit Court of Appeals, Third Circuit. Term No. 273. Enoch L. Johnson, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 31, 1942. Term No. 273, O. T. 1942.

FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 273

ENOCH L. JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	Page in Petition	Page in Brief
Statement of the Case	2	11
Basis of Jurisdiction	3	11
Specification of Errors and Questions Presented	3	14
1. Exclusion of Petitioner from Court Room	5	15
2. Waiver of Petitioner's Constitutional Rights	6	22
3. Denial of Advice of Counsel	7	23
4. Impeachment of Petitioner's Credibility	8	24
5. Privilege Against Self-Incrimination	9	26

TABLE OF CASES.

Adams v. State of Florida, 28 Fla. 511, 10 So. 106 (1891)	5	21
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 81 L. Ed. 1177 (1937)	7	23
Ah Fook Chang v. United States, 91 F. (2d) 805 (C. C. A. 9, 1937)	6	17
Avery v. Alabama, 308 U. S. 444, 84 L. Ed. 377 (1939)	8	
Bullard v. United States, 245 Fed. 837 (C. C. A. 4, 1917)		25
Cohen v. United States, 56 F. (2d) 28 (C. C. A. 1, 1932)		25
Diaz v. United States, 223 U. S. 442, 56 L. Ed. 500 (1912)	6, 7	16, 22
Fina v. United States, 46 F. (2d) 643 (C. C. A. 10, 1931)	6	17

TABLE OF CASES (Continued.)

	Page in Petition	Page in Brief
Hodges v. Easton, 106 U. S. 408, 27 L. Ed. 169 (1882)	7	22
Hooker v. Commonwealth, 13 Gratt. (Va.) 763 (1855)		16
Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262 (1884)	6, 7	16, 22
Hurtado v. People of California, 110 U. S. 516, 28 L. Ed. 232 (1884)		17
Johnson v. United States, 110 F. (2d) 562 (D. C. C. A., 1940)	8	23
Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461	7, 8	23, 24
Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011 (1892)	6, 7	16, 22
Melaragno v. United States, 88 F. (2d) 264 (C. C. A. 3, 1937)	9	26
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093 (1937)	7	23
Patton v. United States, 281 U. S. 276, 74 L. Ed. 860 (1930)		20
Phelin v. Kenderdine, 20 Pa. 354 (1853)	9	27, 28
Ponzi v. Fessenden, 258 U. S. 254, 66 L. Ed. 607 (1922)	6	16
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158 (1932)	8	24
Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054 (1926)		27
Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859 (1941)	8	24
Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674 (1934)	6	17, 18, 19, 20
Thomas v. District of Columbia, 90 F. (2d) 424 (D. C. C. A., 1937)	8,	23

TABLE OF CASES (Continued.)

	Page in Petition	Page in Brief
Thomas v. Mills, 117 Ohio St. 114, 157 N. E. 488 (1927)	8	24
Tiller v. State, 96 Ga. 430, 23 S. E. 825 (1895)	5	21, 22
United States v. Montgomery, 126 F. (2d) 151 (C. C. A. 3, 1942)	9	26
Walker v. Johnson, 312 U. S. 275, 85 L. Ed. 830 (1941)	8	24

STATUTES CITED.

Act of June 22, 1936, c. 690, Section 145(b) 49 Stat. 1648	1	
Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938	3	11

IN THE

Supreme Court of the United States

ENOCH L. JOHNSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

October Term, 1942

No.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully presents:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner was indicted in the District Court of the United States for the District of New Jersey for a violation of the Revenue Act of 1936, Act of June 22, 1936, c. 690, Section 145 (b), 49 Stat. 1648, which provides, inter alia, that:

". . . Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, . . . be guilty of a felony . . ."

Count I, on which petitioner was acquitted, dealt with his income tax for the year 1935. Count II alleged that petitioner had actually received in 1936 gross income amounting to $92,358.19, which included an item of $62,400.00 from the numbers game, but that he had failed to include this item in his return and had stated his gross income to be $29,958.10. Count III referring to petitioner's 1937 income, contained substantially the same allegations.

Petitioner was convicted on the second and third counts and sentenced to five years imprisonment and to pay a fine of $10,000.00 on each count, the said terms of imprisonment to be consecutive.

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit which, by a divided Court, affirmed the judgment and sentence. It is this judgment which is now sought to be reviewed.

During the course of the trial, the petitioner (1) was excluded from the court room, on the motion of the United States Attorney, after the jury had been withdrawn, pending the determination by the court of the propriety of a further line of cross-examination; (2) was denied the assistance of his counsel, in that upon his return to the court room, he was not permitted, at the request of the United States Attorney and the direction of the court, to be informed of the nature of the argument that had taken place, nor was he permitted to confer with counsel over the necessity and advisability of claiming privilege; (3) was compelled on cross-examination, for the purpose of impeaching his credibility, to testify to an irrelevant collateral crime, of which he had not been convicted, a method of examination contrary to the rule generally applied by federal courts in criminal cases and specifically contrary to the rule previously followed by the Circuit Court of Appeals for the Third Circuit; (4) was permitted to claim his privilege against self-incrimination in refusing to testify as to a collateral crime, but was penalized for

claiming such privilege when the government attorney was permitted to argue to the jury that the refusal to answer for the reason assigned constituted impeaching conduct, and when the court charged the jury that his failure to testify might be considered in testing his credibility and good faith.

II.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and forbids the deprivation of life, liberty, or property, without due process of law; (2) under the Sixth Amendment of the Constitution of the United States which guarantees to a person charged with crime a speedy and public trial and the right to have the assistance of counsel; and (3) under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938.

The judgment to be reviewed, as above-stated, is the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered on June 30, 1942, affirming the judgment of the United States District Court for the District of New Jersey, entered on August 1, 1941 (R. 267).

III.

QUESTIONS PRESENTED.

1. While a criminal trial is being conducted, is it not a violation of the due process clause of the Fifth Amendment and the guarantee of a speedy and public trial under the Sixth Amendment to exclude the defendant from the court room during an argument between opposing coun-

sel concerning the relevancy and constitutionality of a proposed line of cross-examination of the defendant, even though the jury is not then present?

2. If a defendant, in obedience to a court order withdraws from the court room during an argument upon the propriety of a series of questions which are being put to him as a witness, and his counsel does not object, can the defendant be held to have acquiesced in the court's direction so as to have waived his constitutional rights?

3. Is it not a violation of the Fifth and Sixth Amendments to prevent a defendant, by direction of the court upon the request of the United States Attorney, from conferring with his counsel and being advised as to the subject matter of an argument that took place during his enforced absence and as to the necessity and advisability of claiming his constitutional privilege against self-incrimination?

4. Is it not error for the United States District Court for the District of New Jersey to permit cross-examination of a defendant concerning a collateral crime of which he has not been convicted, for the purpose of affecting his credibility, where such examination is contrary to the settled rule of that district and of federal courts generally?

5. Where a defendant in a criminal trial is permitted by the court to claim his privilege against self-incrimination as to certain questions relating to a collateral crime, is it not a violation of the Fifth Amendment for the court to confirm the argument of the government attorney to the jury by charging that such refusals to answer may be considered in testing the defendant's credibility and good faith?

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Exclusion of Petitioner from the Court Room.

The majority opinion in the Circuit Court of Appeals states that, "The question which we have before us in the instant case is one which is extremely difficult to answer", and that, "We can find no federal decision precisely in point".

In the admitted absence of any federal authority, and despite state decisions precisely to the contrary (*Adams v. State of Florida*, 28 Fla. 511, 10 So. 106 (1891); *Tiller v. State*, 96 Ga. 430, 23 S. E. 825 (1895)), the Circuit Court laid down a new rule of law, as follows (R. 248):

> "As we have previously indicated, the right of a defendant to be present when the triers of fact are absent is not an absolute right, but one qualified by a condition that nothing occurs when he is not present which could put him in jeopardy."

This rule was further elaborated thereafter (R. 250):

> "We lay down the rule for this circuit that a defendant must be present in the court room at every stage of the proceeding which requires the presence of the jury. This is an absolute right. He should also be present at every other stage of his trial, from the time the first veniremen is called to the box until judgment is rendered by the court upon the verdict of the jury. If he is not present when the triers of the facts are not present but argument is being had before the court during the course of his trial, he must be deemed to be entitled to a new trial if it be found that any of his rights have been endamaged by his absence".

The question whether a defendant need be present only when the jury is present is of first importance in every criminal trial in the federal courts and is one which has not been, but should be, settled by this Court.

The majority opinion (R. 245) adopted as the guide to its conclusion the decision of this Court in *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674 (1934). The decision in that case was by a Court divided five to four, and since the present opinion of the Circuit Court is the first so to construe and apply the *Snyder* case, and since the Circuit Court is itself divided, this Court should review the question to determine whether the interpretation of the *Snyder* case is the correct one.

To the extent that the decision below finds no impairment of a constitutional right in the exclusion of the petitioner from the court room, it is in conflict with the following decisions of this Court and other Circuit Courts:

Hopt v. Utah, 110 U. S. 574, 28 L. Ed. 262 (1884);
Lewis v. United States, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892);
Diaz v. United States, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912);
Ponzi v. Fessenden, 258 U. S. 254, 260, 66 L. Ed. 607, 611 (1922);
Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674 (1934);
Fina v. United States, 46 F. 2d 643, 644 (C. C. A. 10, 1931);
Ah Fook Chang v. United States, 91 F. 2d 805, 809 (C. C. A. 9, 1937).

(2) Waiver of Petitioner's Constitutional Rights.

The dissenting opinion in the Circuit Court vigorously contests the holding of the majority that petitioner

had waived his rights when, without objection, he left the court room at the direction of the court, saying (R. 266):

> "It is imputing responsibility rather summarily to say that a defendant's unquestioning compliance with a court's order at trial implies his acquiescence in the propriety of the order. Any waiver implied from the defendant's submission under the circumstances should not be invoked to dissipate a constitutional right. Cf. Hopt v. Utah, 110 U. S. 574, 579."

That the dissenting Judge has correctly stated the law and that the majority has fallen into error is evidence by numerous decisions of this Court:

Hodges v. Easton, 106 U. S. 408, 412, 27 L. Ed. 169, 171 (1882);
Lewis v. United States, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892);
Diaz v. United States, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912);
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 307, 81 L. Ed. 1093, 1103 (1937);
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393, 81 L. Ed. 1177, 1180 (1937);
Johnson v. Zerbst, 304 U. S. 458, 464, 82 L. Ed. 1461, 1466 (1838).

In the last cited case, Mr. Justice Black said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'."

(3) The Denial of Assistance of Counsel.

The denial by the trial court of the right of petitioner to confer with his counsel and the approval of this action

by the Circuit Court, impaired the petitioner's constitutional safeguards. Numerous decisions of this Court hold that compliance with the constitutional mandate entitling one charged with crime to the assistance of counsel is "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life and liberty":

Powell v. Alabama, 287 U. S. 45, 68-71, 77 L. Ed. 158, 170-172 (1932);
Johnson v. Zerbst, 304 U. S. 458, 467, 468, 82 L. Ed. 1461, 1468 (1938);
Walker v. Johnson, 312 U. S. 275, 286, 85 L. Ed. 830, 836 (1941);
Smith v. O'Grady, 312 U. S. 329, 334, 85 L. Ed. 859, 862 (1941).

Necessarily the right to assistance of counsel means "effective assistance": *Thomas v. District of Columbia*, 90 F. 2d 424, 428 (D. C. C. A., 1937). The right is "not formal, but substantial": *Johnson v. United States*, 110 F. 2d 562, 563 (D. C. C. A., 1940). It is equally obvious that it includes also the right to consult with counsel at every stage in the proceedings, and this, even though it is the attorney and not the defendant himself, who seeks to confer for purposes of planning the defense: *Thomas v. Mills*, 117 Ohio St. 114, 119, 157 N. E. 488, 489 (1927).

"Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari": *Avery v. Alabama*, 308 U. S. 444, 445, 84 L. Ed. 377, 379 (1939).

(4) Impeachment of Petitioner's Credibility.

The majority opinion of the Circuit Court sustained the trial court's approval of a certain line of cross-examination designed to impeach the petitioner's credibility by showing that he had in 1938 received money from the

numbers game, a crime against the law of the State of New Jersey, but one for which he had not yet even been indicted.

This decision is in direct conflict with two very recent opinions of the same Circuit (*Melaragno v. United States*, 88 F. 2d 264 (1937); *United States v. Montgomery*, 126 F. 2d 151 (1942)), and with the rule generally applied by other federal courts.

In view of this conflict on such a substantial and constantly recurring problem, it is most desirable that this Court determine the question finally.

(5) Privilege Against Self-Incrimination.

This phase of the case presents the anomalous situation of a court permitting a defendant to invoke a constitutional privilege and then, in the words of the dissenting Judge, imposing a "legal stigma" on him as a result.

The majority opinion of the Circuit Court held that petitioner was not prejudiced by his claim of privilege, totally ignoring the fact that counsel for the government was permitted to argue to the jury that the refusal to answer constituted impeaching conduct and the charge of the court substantiated that argument.

There is no federal case precisely in point, but see *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings herein; and that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioner have such

other and further relief in the premises as to this Honorable Court may seem meet and just.

WILLIAM A. GRAY,
BENJAMIN M. GOLDER,
Counsel for Petitioner.

JOHN RAUFFENBART,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No.

ENOCH L. JOHNSON,

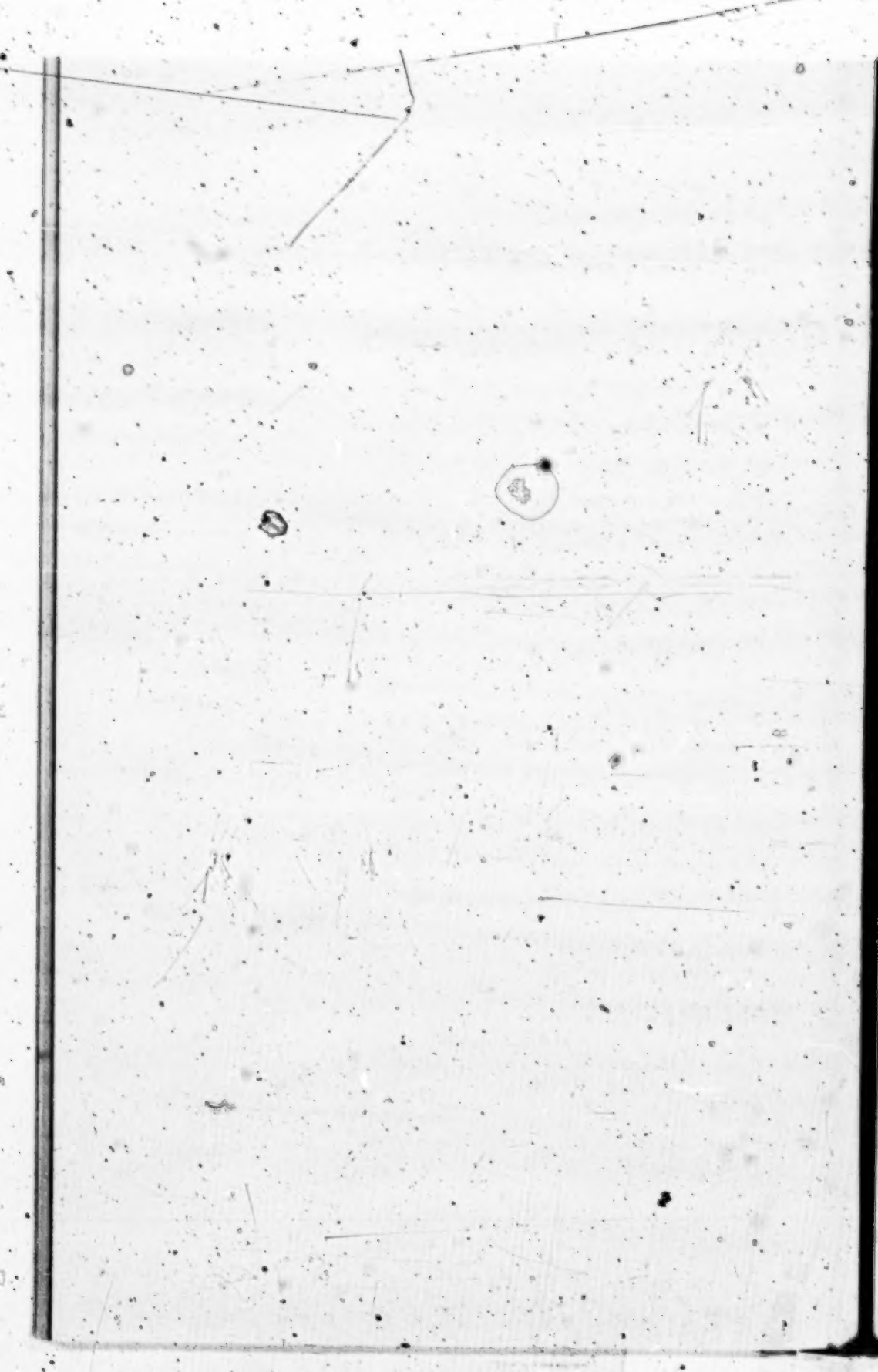
Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.



I. OPINION BELOW.

The opinions for the Circuit Court of Appeals for the Third Circuit, filed June 30, 1942, have not yet been officially reported but a copy is to be found in the record (R. 239).

The oral opinion of the trial court will also be found in the record (R. 39).

II. BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and forbids the deprivation of life, liberty, or property without due process of law; (2) under the Sixth Amendment of the Constitution of the United States which guarantees to a person charged with crime a speedy and public trial and the right to have the assistance of counsel; and (3) under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938.

III. STATEMENT OF THE CASE.

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed June 30, 1942, affirming his conviction and sentence entered in the United States District Court for the District of New Jersey on August 1, 1941, after a trial before the Honorable Albert B. Maris and a jury.

The petitioner was found not guilty on Count I of an indictment which charged him with wilfully attempting to evade and defeat his income tax for the year 1935, but was found guilty on Counts II and III charging him with similar crime for the years 1936 and 1937.

Petitioner was sentenced to five years imprisonment and to pay a fine of $10,000 on each count, the terms of imprisonment to be consecutive.

During the course of the trial, the petitioner admitted receiving money from the so-called numbers business for years 1935, 1936 and for the first ten months of the year 1937, which is all the Government proved. On cross-examination, petitioner testified to his custom of sending slips of paper to his secretary containing notations of money received from the numbers game which represented the net amount remaining after certain deductions had been made, and which was reported in his returns as "Commissions" or "Other Commissions". He was asked by the prosecutor whether he had followed this custom in 1938, to which objection was made and exception allowed (R. 53). Then petitioner was asked whether he had received numbers money in 1938, to which objection was made on the grounds that it was irrelevant and tended to prove another crime, and an exception was allowed (R. 53, 54).

At this juncture, the court asked for argument and, after the jury was withdrawn, the following motion was made by the prosecutor (R. 55):

> "Mr. Burns: If the court please, as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the argument, and that when he resumes the stand he should do so without having an opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.
>
> The Court: I think that is a fair request. You may retire, Mr. Johnson.
>
> (The defendant withdrew.)"

There followed an argument in the course of which

petitioner's counsel contended that the evidence was irrelevant because it related to a separate and disconnected crime, and that it called upon the petitioner to incriminate himself (R. 191). The court ruled that the evidence was admissible on the question of credibility, but that petitioner should be advised of his constitutional right against self-incrimination, without being apprised by his counsel of the subjects discussed in the argument that had taken place and without being permitted to confer with his counsel about the advisability of claiming privilege (R. 190, 197, 202). Petitioner's counsel was granted an exception (R. 201).

Petitioner and the jury were then recalled to the court room and when he resumed the witness stand he was asked whether he had received any numbers money during 1938 (R. 202). At this point, with the approval of the court, his counsel stated to petitioner that he had a constitutional right not to answer questions which might tend to incriminate him (R. 202). He thereupon claimed his privilege (R. 203). He also claimed privilege when asked what money he had used for political purposes during 1938 (R. 204). He was then asked to identify his income tax return for 1938, which he did (R. 206) after an objection was overruled and an exception granted (R. 206). He was asked over objection and exception whether the return for 1938 did not contain an item "other commissions" and answered "Yes" (R. 208). He thereupon was asked what money this item represented, but claimed his privilege (R. 208).

Despite the fact that petitioner had been permitted by the court to invoke his constitutional privilege, the prosecutor in his speech to the jury, commented thereon, as follows (R. 61):

> "Now, ladies and gentlemen, can you believe that man [the petitioner] told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from

on the ground that it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground that it would incriminate him, well, then, I just don't get it."

Objection was made to this statement and the court instructed the jury, as follows (R. 8):

"Mr. Burns also referred to the fact that Mr. Johnson in cross-examination when asked with regard to whom he received numbers money from in 1938, claimed his constitutional privilege of not being required to answer a question which he felt might tend to incriminate him. Now, that may only be considered by you in testing his credibility as to the answers which he did give and his good faith in the matter. We are not trying Mr. Johnson for anything that he did in 1938, that is not before you, that is an entirely different matter with which you or I have not any concern whatever. We are only considering in this case the years 1935, 1936 and 1937. In so far as any suggestion was made by Mr. Burns that that might be considered for any other purpose, you should disregard it."

IV. SPECIFICATION OF ERRORS.

A specification of the errors intended to be urged has been given in the accompanying Petition under the heading "Questions Presented" (supra, pp. 3, 4) and in the interest of brevity will not be repeated, but is referred to and incorporated herein as though set out at length.

V. ARGUMENT.

1. The Exclusion of Petitioner from Court Room (Question 1).

The Circuit Court has laid down a new rule on what it concedes is an "extremely difficult question" and one on which it has found no federal decision precisely in point. That rule is as follows:

> "We lay down the rule for this circuit that a defendant must be present in the courtroom at every stage of the proceeding which requires the presence of the jury. This is an absolute right. He should also be present at every other stage of his trial, from the time the first venireman is called to the box until judgment is rendered by the court upon the verdict of the jury. If he is not present when the triers of the facts are not present, but argument is being had before the court during the course of his trial, he must be deemed to be entitled to a new trial if it be found that any of his rights have been endanmged by his absence."

The Court, then, in applying its test, concluded that Johnson was not damaged by his exclusion from the court room since the jury was not then present, the question being argued was purely one of law[1] and upon his return he was informed of his constitutional privilege and claimed it immediately.

We submit that this rule is in direct conflict with numerous decisions of this Court, which hold that the requirements of due process under the Fifth Amendment and a speedy and public trial under the Sixth Amendment

[1] An examination of the record will show that the discussion was not purely one of law but of mixed law and fact, and that a number of assertions were made by the prosecuting attorney concerning which petitioner was entitled to be advised and to consult with his attorney (R. 125).

are satisfied only by the presence of a defendant at *every* stage of his trial from the time the jury is empaneled to the rendition of their verdict.

Thus, in *Lewis v. United States*, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892), Justice Shiras said:

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, *nothing*[2] shall be done in the absence of the prisoner."

Further in the opinion, the Court quoted with approval the following language from *Hooker v. Commonwealth*, 13 Gratt (Va.) 763, 766 (1855):

> "It is the right of anyone, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses, and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is affected."

In *Diaz v. United States*, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912), it was said:

> "In cases of felony our courts, with substantial accord, have regarded it [the right to be present] as extending to *every* stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself."

See also in accord *Hopt v. Utah*, 110 U. S. 574; 28 L. Ed. 262 (1884); *Ponzi v. Fessenden*, 258 U. S. 254, 260, 66 L. ed. 607, 611 (1922).

The Circuit Court of Appeals for the Tenth Circuit in

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[2] Italics are supplied unless otherwise noted.

Fina v. United States, 46 F. (2d) 643, 644 (1931), has adopted the rule here contended for and declared absolute the right of a defendant to be present throughout his trial:

> "We have no doubt but that it is the constitutional right of one accused of a felony, as in this case, to be present at *every* stage of the trial, because the trial by jury mentioned in our Constitution means a trial by jury according to the rules of the common law. The government . . . contends the burden is on defendant to show prejudice. We cannot agree with this contention at all . . . This being a criminal case on a charge of felony, if error is shown to have been committed, prejudice will be presumed, unless the contrary is clearly made to appear. Again, the error here complained of is a denial to defendant of his constitutional right, and the denial to defendant on trial of his rights guaranteed to him by the Constitution is at all times deemed to be prejudicial."

The same view is taken by the Circuit Court of Appeals for the Ninth Circuit in *Ah Fook Chang v. United States*, 91 F. (2d) 805, 809 (1937).

As the guide to its decision, the court below turned to *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674 (1934), which, although decided under the Fourteenth Amendment, the Circuit Court held equally applicable to the Fifth Amendment: *Hurtado v. People of California*, 110 U. S. 516, 535, 28 L. Ed. 232, 238 (1884).

In the *Snyder* case, the question directly presented for decision was whether the Fourteenth Amendment required the defendant to be present when the jury, at the opening of the trial, viewed the scene of the crime together with the judge and opposing counsel, the view being permitted under a Massachusetts statute. This Court, in affirming the conviction, held that the statute did not violate the Fourteenth Amendment in as much as (p. 105):

> "The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The Court then decided that the historical concept of a view, existing as it had "for about two centuries, if not longer", could not possibly offend the "traditions and conscience of our people". "The Fourteenth Amendment has not displaced the procedure of the ages." (p. 111)

Holding as it does that a view is not part of the trial and hence that a defendant does not have to be present, the *Snyder* case cannot be said to be in conflict with the position now urged upon the Court. On the contrary, Justice Cardozo indicates that the underlying principle of the right of a defendant to be present "gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after". (p. 107)

The majority of the Circuit Court has plucked certain isolated language from Justice Cardozo's opinion and seeks to support its rule thereon (p. 106):

> "It [the presence of defendant] bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend. Nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow."

This language cannot fairly be divorced from the rest of the opinion where the distinction is clearly made "between proceedings *at the trial* and those before and after." Indeed, and it is particularly applicable to the

present case, Justice Cardozo pointed out that "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself."

In the light of this, it would be an anomaly to insist upon the presence of the defendant at a closing argument when his case may be lost already and to exclude him from some earlier part of the trial when a crucial decision was being made and when his presence and assistance would have been vital. It is no answer to say that petitioner's counsel was present and represented him since petitioner could have advised, made suggestions or even superseded his lawyer; nor is it enough, even if it were so, to dismiss petitioner's contention by saying that only an argument on the law was being had. It is submitted that a defendant has a constitutional right to be present at every stage in his trial, especially where the very strategy of his defense is at stake.

In the words of the dissenting Judge in the Circuit Court (R. 266):

> "Any discriminations or refinements as to what does or does not constitute the trial, once the jury is empaneled, the verdict unreturned and the court in session and actually engaged in a disposition of the matter, are likely only to render that right something less than absolute."

We cannot leave our discussion of the *Snyder* case without referring to the dissenting opinion of Mr. Justice Roberts, in which he was joined by three other Justices. While we have attempted to show that there is nothing in the actual decision of the majority in the *Snyder* case which mitigates against our present contention, we direct this Court's attention particularly to the following lan-

guage of Mr. Justice Roberts as showing the manifest danger of the rule laid down by the court below (p. 136):

> "Nor ought this Court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him. As this Court has recently said with respect to disregard of the mandate of the Sixth Amendment respecting trial by jury:
>
> > 'But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar, but more serious infractions which might be conceived. . . . It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been.' "[a]

The rule accepted by the Circuit Court turns largely upon the presence or absence of the jury. It held that a defendant must always be present when the triers of the fact are present but his exclusion when they are not must cause him substantial prejudice in order to constitute reversible error. Now it should be noted that nowhere in any authority is a defendant's right made to depend upon the presence or absence of the jury, and it is not difficult to conceive of a situation in which a trial may be won or lost and a defendant be ultimately freed or imprisoned as the result of a decision made in the absence of the jury. We submit, indeed, that such is the present case, and

[a] Quoting from *Patton v. United States*, 281 U. S. 276, 292, 74 L. Ed. 854, 860 (1930).

even if this Court sees fit to adopt the rule of "substantial prejudice" it should hold that petitioner's cause was fatally harmed by what happened at and resulted from the particular juncture of the trial from which he was excluded. His ignorance of what had occurred, his inability to consult with counsel about statements made by the prosecutor, his lack of advice, at the court's direction, as to the full effect, necessity and advisability of claiming privilege, and the subsequent erroneous charge of the court following the argument made by the government attorney to the jury deprived him of any opportunity of defense and made his conviction a foregone conclusion.

The only state decisions which are closely parallel to the present situation, but which were dismissed by the Circuit Court as "going too far", are *Adams v. State of Florida*, 28 Fla. 511, 555, 556, 10 So. 106, 117 (1891), and *Tiller v. State*, 96 Ga. 430-432, 23 S. E. 825, 826 (1895). Both support the view taken by petitioner which we urge this Court to adopt.

In the *Adams* case the defendant was inadvertently excluded from the court room during the course of an argument at which time the jury was also absent, and yet the court there said:

> "It was early decided in this state, and has been rigidly adhered to in later decision, that the prisoner has the right, and in fact must be present during the trial of a capital case, and no steps can be taken by the Court in his absence. Holton v. State, 2 Fla. 476, 500; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872. There is no doubt about the fact that the accused here was taken from the court room and remained out for at least ten minutes during the discussion of the competency of a witness against him. He has the right to be present and hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence."

The opinion in the *Tiller* case, supra, reaches the same conclusion, saying:

> "It cannot be doubted that the argument of counsel is a stage of the proceedings for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses."

2. Waiver of Petitioner's Rights (Question 2).

The majority of the Circuit Court held that the petitioner had acquiesced in his exclusion from the court room in that no objection was specifically made. However, as the dissenting Judge well says (R. 266):

> "It is imputing responsibility rather summarily to say that a defendant's unquestioning compliance with a court's order at trial implies his acquiescence in the propriety of the order. Any waiver implied from the defendant's submission under the circumstances should not be invoked to dissipate a constitutional right. Cf. Hopt v. Utah, 110 U. S. 574, 579."

Without burdening the Court on this phase of the argument, it is sufficient to say that the view of the dissenting Judge clearly represents the great weight of authority in this Court, as is evidenced by the following citations, which by no means exhaust those available:

Hodges v. Easton, 106 U. S. 408, 412, 27 L. Ed. 169, 171 (1882);
Lewis v. United States, 146 U. S. 370, 372, 36 L. Ed. 1011, 1012 (1892);
Diaz v. United States, 223 U. S. 442, 455, 56 L. Ed. 500, 505 (1912);

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 307, 81 L. Ed. 1093, 1103 (1937);
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393, 81 L. Ed. 1177, 1180 (1937);
Johnson v. Zerbst, 304 U. S. 458, 464, 82 L. Ed. 1461, 1466 (1938).

3. Denial of Advice of Counsel (Question 3).

As has been pointed out above, (p. 14) when the petitioner was excluded from the courtroom upon the motion of the prosecuting attorney it was also directed that upon his return he should not be informed of the nature of the argument that had taken place. Accordingly when he did come back his counsel advised petitioner of his constitutional privilege against self-incrimination but could not discuss with him the nature and outcome of the highly important argument that vitally affected the course of the trial, nor could they confer over the effect and advisability of claiming privilege. It was only after the petitioner had resumed the stand and was being cross-examined again that his attorney was permitted to tell him from the bar of the court of the existence of his privilege. Having it put to him in this way, petitioner naturally claimed his privilege.

It is respectfully submitted that this was in direct contravention of the requirements of the Sixth Amendment guaranteeing to one charged with crime the assistance of counsel.

This right, of course, is "not formal, but substantial": *Johnson v. United States*, 110 F. (2d) 562, 563 (D. C. C. A., 1940). In order to have any meaning whatever, the assistance of counsel must mean "effective assistance": *Thomas v. District of Columbia*, 90 F. (2d) 424, 428 (D. C. C. A., 1937). Thus, the term must comprehend that the accused shall have the right not only to be represented by

counsel at the trial, but also the right to confer with him "not merely during the actual stages of the trial, but at every point in the proceedings": *Thomas v. Mills*, 117 Ohio St. 114, 119, 157 N. E. 488, 489 (1927).

It follows from our contention that petitioner had a constitutional right to be present at every stage in the trial that he necessarily had the right to be informed fully about the argument that had taken place. This becomes all the more apparent when it is considered that what had transpired constituted such a crucial point in the trial.

It is true that the cases of *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158 (1932), and *Johnson v. Zerbst*, 304 U. S. 458, 82 L. Ed. 1461 (1938)[4] are concerned primarily with the right of an accused to have counsel in the first instance. However, the underlying rationale of those cases is that defendant is entitled to have "the guiding hand of counsel at *every* step in the proceedings against him": *Powell v. Alabama*, supra, at page 69.

It should be added that the Court in *Powell v. Alabama*, supra, at page 70, indicated that "the right of the accused to the presence, *advice* and assistance of counsel [is] necessarily included in due process of law. 2 Story, Const. 4th ed. § 1949, p. 668".

4. Impeachment of Petitioner's Credibility (Question 4).

The petitioner was indicted for wilfully attempting to evade and defeat his income taxes for the years 1935, 1936, and 1937 and for no other years. We have related above (pp. 13, 14) the successful attempt of the prosecutor, approved by both lower courts, to impeach his credibility, to cross-examine him as to whether or not he had, in 1938, received money from the numbers game, what he had done

[4] See also *Walker v. Johnston*, 312 U. S. 275, 286, 85 L. Ed. 830, 836 (1941), and *Smith v. O'Grady*, 312 U. S. 329, 334, 85 L. Ed. 859, 862 (1941).

with it and whether or not he had used the same "bookkeeping system" as he had in the previous years.

The essence of our argument is that certain questions were asked which were objected to and which the petitioner was then either forced to answer or else to claim his privilege. Those questions on their face related to the commission of other crimes for which he might possibly be indicted at some later time. The approval of this erroneous line of questioning worked further harm as we shall discuss under Point 5.

A further quotation from the dissenting Judge demonstrates the nub of the error made in the trial (R. 259):

> "It is less than clear to me how the matter thus inquired about can be deemed capable of serving as the basis for impeachment. Necessarily, even a possibility of refutation would depend upon how the defendant testified in such regard. If he told the truth, he could hardly be thought to have impeached himself, even though a conflict should incidentally develop upon a comparison of his testimony with extraneous matter. Yet, the irrelevant matter, which on the government's theory would constitute a separate offense for which the defendant was not on trial, would have been heard by the jury. On the other hand, if he testified falsely, the government would not be in position to refute him, for the cross-examiner is bound by the answers which he elicits to questions concerning collateral matter."

See in accord *Cohen v. United States*, 56 F. (2d) 28, 30 (C. C. A. 1, 1932) and *Bullard v. United States*, 245 F. 837, 840 (C. C. A. 4, 1917).

It must be remembered that the questions thus permitted related to offenses for which petitioner had not been, but could be indicted. In approving them the

Circuit Court is in conflict with its own recent decision in *United States v. Montgomery*, 126 F. 2d 151 (1942), which, oddly, it cites in the present case (R. 253 n. 3). The *Montgomery* case also arose in the District Court for the District of New Jersey and there too the question involved was the impeachment of a witness. The Court held (p. 155):

> "It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the light of general authority and sound reason. So treating with the question raised in the instant case, *we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility.*"

Melaragno v. United States, 88 F. 2d 264 (C. C. A. 3, 1937), is to the same effect.

A fortiori the trial court and the Circuit Court were in error in permitting a series of questions relating to criminal offenses for which petitioner had not even been indicted, and this trial error led to an even more grievous one.

5. The Perversion of the Privilege Against Self-Incrimination (Question 5).

Our contention is that when the constitutional privilege against self-incrimination is exercised, by invitation of the court, it is absolute; that the question of its exercise is a matter solely between the trial judge and the witness in which the jury has no part; that no inference can

be drawn from its exercise and consequently the jury can not consider it in determining the credibility of the witness who has invoked it.

As has already been described while the petitioner was being cross-examined, the trial court permitted his counsel to tell him that he had a constitutional privilege against self-incrimination, but by reason of the court's further direction, made at the instance of the prosecuting attorney, petitioner and his counsel were prohibited from conferring and discussing the advisability of claiming the privilege. Then, after petitioner, in this unenlightened state, had claimed his constitutional protection, the court not only permitted the government attorney to argue to the jury that the refusal to answer affected petitioner's credibility, but reiterated this devastating infringement of his rights in its charge. In this perverse fashion, his constitutional right, far from affording him protection, boomeranged against him in the most unexpected manner and may fairly be said to have weighed heavily against him.

In passing, we may note that there was perhaps "probable error" in permitting the claim of privilege in the first instance if the trial court and Circuit Court are right in holding that the line of questioning was proper since a defendant witness cannot claim privilege as to a *proper* line of cross-examination.[5]: *Raffel v. United States*, 271 U. S. 494, 497, 70 L. Ed. 1054, 1058 (1926). "But having been allowed by the court so to plead in this case, surely the defendant did not thereby subject himself to impeachment merely because he exercised a privilege which the court, even though mistakenly, accorded to him."[6]

The rule was settled as long ago as *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853), that:

[5] As has been argued, the questions were highly improper.
[6] Dissenting Opinion, (R. 263).

"When a witness declines answering a question, upon the ground of its tendency to incriminate himself, the objection is addressed to the *Court*, and the decision upon it is to be made by the *Court*, and not by the *jury*. If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it. The exercise of this right by the witness is not under the control of the parties, and no one can be affected by evidence which his adversary fails to produce, and which, therefore, cannot be met or explained by cross-examination, rebutting evidence, or otherwise . . ."[1]

CONCLUSION.

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decision.

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Counsel for Petitioner.

JOHN RAUFFENBART,
Of Counsel.

[1] Italicized in the original.

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IN THE

Supreme Court of the United States

October Term, 1942

No. 273

ENOCH L. JOHNSON,
Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER

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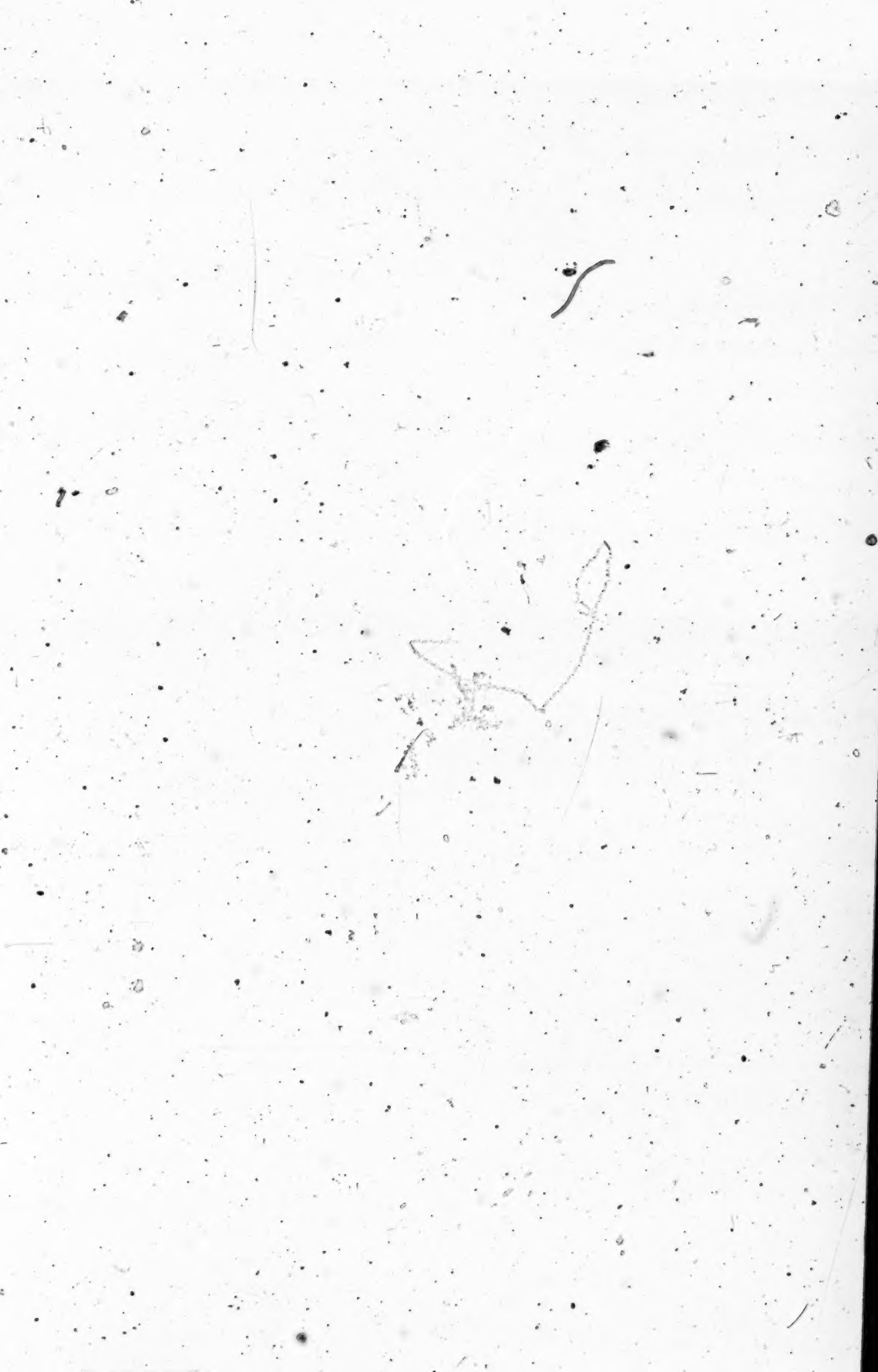

INDEX TO BRIEF

	Page
I. Opinions Below	1
II. Basis of Jurisdiction	1
III. Statement of the Case	2
IV. Questions Presented	6
V. Argument:	
(1) The Expulsion of Petitioner from the Court Room	8
(2) Waiver of Petitioner's Rights	18
(3) Denial of Advice of Counsel	20
(4) Impeachment of Petitioner's Credibility	23
(5) The Perversion of the Privilege Against Self-incrimination	25
Conclusion	28

CITATIONS

Cases:

Adams v. State, 28 Fla. 511, 10 So. 106	14, 15, 16
Aetna Insurance Co. v. Kennedy, 301 U. S. 389	19
Ah Fook Chang v. United States, 91 F. 2d 805	10
Ayers v. United States, 58 F. 2d 607	28
Betts v. Brady, 316 U. S. 455	21, 22
Boyle v. Smithman, 146 Pa. 255, 23 A. 397	26
Brooks v. State, 77 Tex. Cr. 517, 179 S. W. 447	14
Bullard v. United States, 245 F. 837	24
Burns v. United States, 274 U. S. 328	28
Caminetti v. United States, 242 U. S. 470	27
Cohen v. United States, 56 F. 2d 28	24
Commonwealth v. Cohen, 133 Pa. Superior Ct. 437, 2 A. 2d 560	11

Commonwealth v. House, 6 Pa. Superior Ct. 92 11
Commonwealth v. O'Keefe, 298 Pa. 169, 148 A. 73 17
Crawford v. United States, 212 U. S. 183 28
Diaz v. United States, 223 U. S. 442 ..... 10, 19
Dowdell v. United States, 221 U. S. 325 10
Fina v. United States, 46 F. 2d 643 10
Garman v. State, 66 Miss. 196, 5 So. 385 17
Glasser v. United States, 315 U. S. 60 ..... 16, 18, 19, 21, 22
Harrison v. Powers, 76 Ga. 218 26
Hodges v. Easton, 106 U. S. 408 19
Hopt v. Utah, 110 U. S. 574 10
Johnson v. United States, 110 F. 2d 562 20
Johnson v. Zerbst, 304 U. S. 458 ..... 19, 21
Krotkiewicz v. United States, 19 F. 2d 421 27
Lewis v. United States, 146 U. S. 370 ..... 10, 19
Louie Yung v. Coleman, 5 F. Supp. 702 20
McCandless v. United States, 298 U. S. 342 16
McDonald v. Hudspeth, 41 F. Supp. 182 20
Melaragno v. United States, 88 F. 2d 264 25
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292 19
Parks v. State, 102 Tex. Cr. 24, 276 S. W. 1106 14
Patton v. United States, 281 U. S. 276 ..... 16, 19
Phelin v. Kenderdine, 20 Pa. 354 27
Pierce v. State, 47 Ga. App. 830, 171 S. E. 731 11
Ponzi v. Fessenden, 258 U. S. 254 10
Powell v. Alabama, 287 U. S. 45 21
Raffel v. United States, 271 U. S. 494 ..... 27, 28
Reagan v. United States, 157 U. S. 301 27
Rose v. United States, 128 F. 2d 622 28
Schwab v. Berggren, 143 U. S. 442 9
Shields v. United States, 273 U. S. 583 10
Snyder v. Massachusetts, 291 U. S. 97 ..... 8, 12, 13, 15, 18, 21
State v. Vroman, 45 S. D. 465, 188 N. W. 746 26
State v. Weber, 272 Mo. 475, 199 S. W. 147 27
Thomas v. District of Columbia, 90 F. 2d 424 20
Tiller v. State, 96 Ga. 430, 23 S. E. 825 ..... 16, 17
Tomlinson v. United States, 93 F. 2d 652 27
Tumey v. Ohio, 273 U. S. 510 16
United States v. Atkinson, 297 U. S. 157 28
United States v. Johnson, 123 F. 2d 111 23
United States v. Johnson, 129 F. 2d 954 ..... 9, 14, 18, 24

United States v. Montgomery, 126 F. 2d 151 24
Wiborg v. United States, 163 U. S. 632 28

STATUTES:

Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 1
Act of June 22, 1936, c. 690, Section 145 (b), 49 Stat. 1648 2

MISCELLANEOUS:

Cooley on Constitutional Limitations (8th ed.) 12
31 Michigan Law Review 245 17
17 Minnesota Law Review 415 17

I.

OPINIONS BELOW

The opinions for the Circuit Court of Appeals for the Third Circuit are reported in 129 F. 2d 954 (R. 217-241). The oral opinion of the trial court will be found in the record (R. 200).

II.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and forbids the deprivation of life, liberty, or property without due process of law; (2) under the Sixth Amendment of the Constitution of the United States which guarantees to a person charged with crime a speedy and public trial and the right to have the assistance of counsel; and (3) under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938.

III.

STATEMENT OF THE CASE

This Court granted certiorari on October 12, 1942 to review the judgment of the Circuit Court of Appeals for the Third Circuit affirming petitioner's conviction and sentence entered in the United States District Court for the District of New Jersey.

The petitioner was found not guilty on Count I of an indictment which charged him with wilfully and feloniously attempting to evade and defeat his income tax for the year 1935, but was found guilty on Counts II and III charging him with similar offenses for the years 1936 and 1937 in violation of the Revenue Act of 1936, c. 690, Section 145 (b), 49 Stat. 1648.

Petitioner was sentenced to five years imprisonment and to pay a fine of $10,000 on each count, the terms of imprisonment to be consecutive.

The Government sought to prove that the petitioner had received money from those operating the "numbers business" in Atlantic City and that he had failed to include all of it in his income tax returns. During the course of the trial, the petitioner admitted receiving money from the so-called numbers business for the years 1935, 1936 and for the first ten months of the year 1937, which is all the Government proved. On cross examination, petitioner testified to his custom of sending slips of paper to his secretary containing notations of money received from the numbers game which represented the net amount remaining after certain deductions had been made, and which was reported in his returns as "Commissions" or "Other Commissions". He

was asked by the prosecutor whether he had followed this custom in 1938, to which objection was made and exception allowed (R. 126). Then petitioner was asked whether he had received numbers money in 1938, to which objection was made on the grounds that it was irrelevant and tended to prove another crime. The objection was overruled and an exception was allowed (R. 130-131).

After petitioner answered in the affirmative, he was then asked who had given the money to him. His counsel reiterated his objection to this line of questioning and suggested that the point be argued in the absence of the jury. The court agreed and after the jury was withdrawn, the following motion was made by the prosecutor (R. 132):

> "Mr. Burns: If the court please, as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the argument, and that when he resumes the stand he should do so without having an opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.
>
> The Court: I think that is a fair request. You may retire, Mr. Johnson.
>
> (The defendant withdrew.)"

There followed an argument in the course of which petitioner's counsel contended that the evidence was irrelevant because it related to a separate and disconnected crime, and that it called upon the petitioner to incriminate himself (R. 132-139). The court ruled that the evidence was admissible on the question of credibility alone, and that petitioner could be advised of his constitutional right against self-incrimination without, however, being apprised by his counsel of the nature and outcome of the argument. An exception was granted (R. 139). He was not permitted

to confer with his counsel about the advisability and effect of claiming privilege.

Petitioner and the jury were then recalled to the court room and he was required to resume the witness stand immediately. He was asked again from whom he had received numbers money during 1938 (R. 139). At this point, with the permission of the court, his counsel stated to petitioner that he had a constitutional right not to answer questions which might tend to incriminate him. He thereupon claimed his privilege (R. 140). He also claimed privilege when asked what money he had used for political purposes during 1938 (R. 141). He was then asked to identify his income tax return for 1938, which he did after an objection was overruled and an exception granted (R. 142). He was asked over objection and exception whether the return for 1938 did not contain an item "Other Commissions" and answered "Yes". He thereupon was asked what money this item represented, but claimed his privilege R. 142-43).

Despite the fact that petitioner had been permitted by the court to invoke his constitutional privilege, the prosecutor in his speech to the jury, commented thereon, as follows (R. 167):

> "Now, ladies and gentlemen, can you believe that man [the petitioner] told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from on the ground that it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground that it would incriminate him, well, then, I just don't get it."

Objection was made to this statement and the court in its charge instructed the jury as follows (R. 173-74):

"Mr. Burns also referred to the fact that Mr. Johnson in cross examination when asked with regard to whom he received numbers money from in 1938, claimed his constitutional privilege of not being required to answer a question which he felt might tend to incriminate him. *Now, that may only be considered by you in testing his credibility as to the answers which he did give and his good faith in the matter.* We are not trying Mr. Johnson for anything that he did in 1938, that is not before you, that is an entirely different matter with which you or I have not any concern whatever. We are only considering in this case the years 1935, 1936 and 1937. In so far as any suggestion was made by Mr. Burns that that might be considered for any other purpose, you should disregard it."

IV.
QUESTIONS PRESENTED

1. While a criminal trial is being conducted, is it not a violation of the due process clause of the Fifth Amendment and the guarantee of a speedy and public trial under the Sixth Amendment to expel the defendant from the court room during an argument between opposing counsel concerning the relevancy and constitutionality of a proposed line of cross examination of the defendant, even though the jury is not then present?

2. If a defendant, in obedience to a court order withdraws from the court room during an argument upon the propriety of a series of questions which are being put to him as a witness, and his counsel does not object, can the defendant be held to have acquiesced in the court's direction so as to have waived his constitutional rights?

3. Is it not a violation of the Fifth and Sixth Amendments to prevent a defendant, by direction of the court upon the request of the United States Attorney, from conferring with his counsel and being advised as to the subject matter of an argument that took place during his enforced absence and as to the necessity and advisability of claiming his constitutional privilege against self-incrimination?

4. Is it not error for the United States District Court for the District of New Jersey to permit cross examination of a defendant concerning a collateral crime of which he has not been convicted, for the purpose of affecting his credibility, when such examination is contrary to the settled rule of that district and of federal courts generally?

5. When a defendant in a criminal trial is permitted by the court to claim his privilege against self-incrimination as to certain questions relating to a collateral crime, is it not a violation of the Fifth Amendment for the court to confirm the argument of the government attorney to the jury by charging that such refusals to answer may be considered in testing the defendant's credibility and good faith?

V.

ARGUMENT

(1) The Expulsion of Petitioner from the Court Room

This case presents the extraordinary situation of a defendant in a criminal prosecution being compelled by the trial judge, at the request of the Government attorney (the jury having withdrawn), to leave the court room during the course of his trial and being compelled further to resume the stand "without having an opportunity to hear what the argument [was] about".[1]

The research of two courts and counsel has failed to unearth a single case in which such a procedure was even attempted, let alone sanctioned, and we think that this, in itself, is highly indicative of the unique impropriety that was here committed.

The Circuit Court in the majority opinion conceded that this is an "extremely difficult question" on which it found no federal authority precisely in point, although it relied on *Snyder v. Massachusetts*, 291 U. S. 97 (1934), a case in which this Court divided five to four on a situation which, as we shall hereafter explain, was sui generis. The Circuit Court then adopted the following rule (R. 226):

> "We lay down the rule for this circuit that a defendant must be present in the court room at every stage of the proceeding which requires the presence of

[1] This was the suggestion of the prosecutor and the trial judge thought it "a fair request". (R. 432)

the jury. This is an absolute right. He should also be present at every other stage of the trial, from the time the first venireman is called to the box until judgment is rendered by the court upon the verdict of the jury. If he is not present when the triers of the facts are not present, but argument is being had before the court during the course of his trial, he must be deemed to be entitled to a new trial if it be found that any of his rights have been endamaged by his absence."[2]

In applying this test the Court concluded that the petitioner suffered no prejudice since the question being argued was purely one of law[3] and, since upon his return he was informed of his constitutional privilege and claimed it immediately.

The rule as thus laid down is framed in terms of "presence" and, we submit, does not put proper emphasis on the question actually before the court for decision, namely, under what circumstances is it proper to *expel* a defendant from the court room during his trial for the express purpose of preventing him from seeing and hearing what is about to transpire.

Even the rule as enunciated and applied, however, is irreconcilable with the complete uniformity of expression in federal decisions that due process of law in a criminal case requires the presence of the accused at *every* stage in his trial from the time the jury is empaneled until it renders its verdict.

Thus, this Court, speaking through Justice Harlan, in *Schwab v. Berggren*, 143 U. S. 442, 448 (1892) said:

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[2] 129 F. 2d 954, 960 (1942).

[3] The argument was actually one of mixed law and fact in which a number of assertions were made by the prosecutor about which petitioner was entitled to be advised and to consult with his attorney (R. 132-39).

"The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

And, in *Lewis vs. United States*, 146 U. S. 370, 372 (1892), in an opinion by Justice Shiras, it was said:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."

Again, in *Diaz vs. United States*, 223 U. S. 442, 455 (1912), Justice Van Devanter reiterated the principle that:

"In cases of felony, our Courts, with substantial accord, have regarded it [the right to be present] as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself."

Similar recognition of the general rule may also be found in *Hopt v. Utah*, 110 U. S. 574 (1884), and *Dowdell v. United States*, 221 U. S. 325, 331 (1911). More recently two opinions by Chief Justice Taft have expressed the same view: *Ponzi v. Fessenden*, 258 U. S. 254, 260 (1922); *Shields v. United States*, 273 U. S. 583, 588, 589 (1927).

Those lower federal courts which have had occasion to pass on the question are in accord with the expressions above quoted: see, for example, *Fina v. United States*, 46 F. 2d 643, 644 (C. C. A. 10, 1931); *Ah Fook Chang v. United States*, 91 F. 2d 805, 809 (C. C. A. 9, 1937).

In the former case the court said:

"We have no doubt but that it is the constitutional right of one accused of a felony, as in this case, to be

present at every stage of the trial, because the trial by jury mentioned in our Constitution means a trial by jury according to the rules of the common law. The government * * * contends the burden is on defendant to show prejudice. We cannot agree with this contention at all. * * * This being a criminal case on a charge of felony, if error is shown to have been committed, prejudice will be presumed, unless the contrary is clearly made to appear. Again, the error here complained of is a denial to defendant of his constitutional right, and the denial to defendant on trial of his rights guaranteed to him by the Constitution is at all times deemed to be prejudicial."

Unquestionably, the great weight of authority in the state courts is in complete agreement with this view.[4] Thus, in *Commonwealth v. House*, 6 Pa. Superior Ct. 92, 111 (1897), quoted with approval in *Commonwealth v. Cohen*, 133 Pa. Superior Ct. 437, 442, 2 A. 2d 560, 562, (1938), it was said:

"No Pennsylvania case has held, or, as we firmly believe ever will hold, that a defendant, whether indicted for a felony or a misdemeanor, can be tried in his absence, unless he has expressly or impliedly waived the right to be present."

And in *Pierce v. State*, 47 Ga. App. 830, 831, 171 S. E. 731, 732 (1933), a case in which the defendant was absent for *only two minutes* while the State attorney was arguing to the jury, the court said in granting a new trial:

"We think that the right to be present at all stages of the trial ranks among the defendant's most sub-

[4] See the dissenting opinion of Mr. Justice Roberts in *Snyder v. Massachusetts*, 291 U. S. 97, 130-132 (1934), especially the cases cited in footnote 23.

stantial rights. It ranks next in importance to, if not on a par with, his right to be presumed to be innocent until proven guilty. * * * 'The presence of the counsel was no substitute for that of the men on trial. Both should have been present.'"

The general rule is summarized in *Cooley on Constitutional Limitations* (8th Ed. 1927), p. 667:

> "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial and until the final judgment."

Despite the adherence which has been given to this time-honored principle, the Circuit Court, as we have said, relied solely on its interpretation of *Snyder v. Massachusetts*, 291 U. S. 97 (1934).[3]

The question directly presented for decision in that case was whether the Fourteenth Amendment required the defendant in a criminal case to be present when the jury, at the opening of the trial, viewed the scene of the crime, accompanied by the judge and opposing counsel, the view being permitted by a Massachusetts statute. In affirming the conviction, this Court held that the statute did not violate the Fourteenth Amendment since "the Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (p. 105)

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[3] The *Snyder* case, although deciding what constitutes due process under the Fourteenth Amendment, was held by the Circuit Court to be applicable equally to the due process clause of the Fifth Amendment.

The Court then decided that "a view is not a 'trial' nor any part of a trial in the sense in which a trial was understood at common law". (p. 113) This historical concept of a view, existing as it has "for about two centuries, if not longer", could not possibly offend the "traditions and conscience of our people". (p. 111)

Holding as it does, then, that a view is not part of the trial and hence that a defendant does not have to be present, the *Snyder* case cannot be said to be in conflict with the position now urged upon the Court. Indeed, a close reading of Justice Cardozo's opinion will show that he reserved decision upon this type of situation (p. 117):

> "This Court has not yet held that even upon a trial in court the absence of a defendant for a few moments while formal documents are marked in evidence will vitiate a judgment. * * * But we do not need to dwell upon the measure of the privilege at such a time or in such conditions. Whatever it may be, not even an intimation will be found in our decisions that there is a denial of due process if the accused be excluded from a view, though present at every stage of the proceedings in the court."

Justice Cardozo further recognized that "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." (p. 106)

In the light of this, it would be an anomaly to insist upon the presence of the defendant at a closing argument when his case already may have been lost and to exclude him from some earlier part of the trial when a crucial decision was being made and when his presence and assistance

would have been vital. It is no answer to say that petitioner's counsel was present and represented him since petitioner could have advised, made suggestions or even superseded his lawyer; nor is it enough to dismiss petitioner's contention by saying, even if it were so, that only an argument on the law was being had.[6] It is submitted that a defendant has a constitutional right to be present at every stage in his trial, especially where the very strategy of his defense is at stake.

In the words of the dissenting Judge in the Circuit Court (R. 241):

> "Any discriminations or refinements as to what does or does not constitute the trial, once the jury is empaneled, the verdict unreturned and the court in session and actually engaged in a disposition of the matter, are likely only to render that right something less than absolute."[7]

The rule accepted by the Circuit Court turns largely upon the presence or absence of the jury. It held that a defendant must always be present when the triers of the fact are present but his absence when they are not must cause him substantial prejudice in order to constitute reversible error. It should be noted that nowhere in any authority is a defendant's right made to depend upon the presence or absence of the jury,[8] and it is not difficult to

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[6] "* * * arguments to the court touching matters of law, as well as fact, should be in the hearing of the accused and his counsel": *Parks v. State*, 102 Tex. Cr. 24, 25, 26, 276 S. W. 1106, 1107 (1925). See in accord *Adams v. State of Florida*, 28 Fla. 511, 556, 10 So. 106, 117 (1891), quoted *infra*, p. 16.

[7] 129 F. 2d 954, 967 (1942).

[8] On the contrary, in *Brooks v. State*, 77 Tex. Cr. 517, 179 S. W. 447 (1915), it was held to be reversible error for the defendant's own attorney to make an argument to the court in the defend-

conceive of a situation in which a trial may be won or lost and a defendant be ultimately freed or imprisoned as the result of action taken in the absence of the jury. We submit, indeed, that such is the present case, and even if this Court sees fit to adopt the rule of "substantial prejudice" it should hold that petitioner's cause was fatally harmed by what happened at and resulted from the particular juncture of the trial from which he was expelled. His ignorance of what had occurred, his inability to consult with counsel about statements made by the prosecutor, his being deprived of advice, at the court's direction, as to the full effect, necessity and advisability of claiming privilege, and the subsequent erroneous charge of the court following the argument made by the government attorney to the jury ignored his constitutional rights and aided materially in bringing about his conviction.

We submit, however, that it is an entirely erroneous approach and one incompatible with the trend of decisions in this Court, to make the protection of the defendant's right depend upon the amount of prejudice he suffers through its denial. As Mr. Justice Roberts said in his dissenting opinion in the *Snyder* case (p. 136):

> "Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him. As this court has recently said with respect to disregard of

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ant's absence, even though the jury was also at that time not present in the court room. See similarly *Adams v. State of Florida*, 28 Fla. 511, 10 So. 106 (1891), discussed *infra*, p. 16.

the mandate of the Sixth Amendment respecting trial by jury:

> 'But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. * * * It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been.' "*

See also *Tumey v. Ohio*, 273 U. S. 510, 535 (1926); *Glasser v. United States*, 315 U. S. 60 (1942); and compare *McCandless v. United States*, 298 U. S. 342, 347 (1936).

The only state decisions which the Circuit Court found closely parallel to the present situation, but which were dismissed as "going too far", are *Adams v. State of Florida*, 28 Fla. 511, 555, 556, 10 So. 106, 117 (1891), and *Tiller v. State*, 96 Ga. 430-432, 23 S. E. 825, 826 (1895). Both support the view taken by petitioner which we urge this court to adopt.

In the *Adams* case the defendant was inadvertently excluded from the court room during the course of an argument at which time the jury was also absent, and yet the court there said:

> "It was early decided in this state, and has been rigidly adhered to in later decision, that the prisoner has the right, and in fact must be present during the trial of a capital [10] case, and no steps can be taken by

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* Quoting from *Patton v. United States*, 281 U. S. 276, 292 (1930).

[10] No distinction should be made in securing the requirements of due process between a capital case and any other felony or serious misdemeanor in which the defendant's liberty may be at stake. The Circuit Court recognized no such distinction in refusing

the court in his absence. Holton v. State, 2 Fla. 476, 500; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872. There is no doubt about the fact that the accused here was taken from the court room and remained out for at least ten minutes during the discussion of the competency of a witness against him. He has the right to be present and hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence."

The prosecutor in the *Tiller* case made his argument to the jury while the defendant was, unknown to the Judge, still confined in the jail to which he had been taken during a court recess. This was held to be such error as to require a new trial, the court saying:

> "It cannot be doubted that the argument of counsel is a stage of the proceedings for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses."

We submit most earnestly that this court should unequivocally establish the rule for federal courts that the accused in a criminal case has the right to be present at every stage in his trial from the moment the first veniremen is called until the rendition of the verdict. But, in any event, we submit that due process of law requires the condemnation of a rule that permits the expulsion from the

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to follow either the *Adams* case or the *Tiller* case, nor has this Court in any of the cases to which we have referred. See Notes in 31 Michigan Law Review 245, 252 (1932); 17 Minnesota Law Review 415, 418 (1933); *Commonwealth v. O'Keefe*, 298 Pa. 169, 148 A. 73 (1929); *German v. State*, 66 Miss. 196, 5 So. 385 (1889).

court room of a defendant already present during the course of his trial.

> "The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof":
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> *Snyder v. Massachusetts*, 291 U. S. 97, 122 (1934).

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(2) Waiver of Petitioner's Rights.

The majority of the Circuit Court sought to bolster its position that petitioner suffered no harm by his exclusion from the court room by holding further that he had acquiesced in the trial judge's order, since no specific objection was made. This conclusion is fully answered by the dissenting judge when he says (R. 241):

> "It is imputing responsibility rather summarily to say that a defendant's unquestioning compliance with a court's order at trial implies his acquiescence in the propriety of the order. Any waiver implied from the defendant's submission under the circumstances should not be invoked to dissipate a constitutional right. Cf. Hopt v. Utah, 110 U. S. 574, 579."[11]

As this court has recently had occasion to point out, "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights": *Glasser v.*

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[11] 129 F. 2d 954, 967 (1942).

United States, 315 U. S. 60, 70 (1942). When one compares the facts of the present case in which the petitioner, who is a layman, merely obeyed a court order without objection, with the facts in the *Glasser* case in which no waiver was found although the defendant was an attorney with considerable experience in criminal procedure, it is difficult to see how any acquiescence or waiver can be imputed to the petitioner. Especially is this so since petitioner, unlike Glasser, did assign the action of the trial judge as error and did make it a ground of appeal.

In the *Glasser* case, this court further emphasized the duty that rests upon a trial judge to see "that the trial is conducted with solicitude for the essential rights of the accused". (p. 71) It was said, quoting Justice Sutherland,[12] that this duty must be discharged "with an eye to avoid unreasonable or undue departures" from the accepted mode of jury trial.

Despite the protecting duty thus incumbent upon the trial judge, he nevertheless unhesitatingly granted the prosecutor's extraordinary motion, saying merely that it was a "fair request".

This Court has so frequently refused to presume acquiescence in the loss of fundamental rights that we think it sufficient to refer to a number of those cases to show that the majority of the Circuit Court ruled improperly:

Hodges v. Easton, 106 U. S. 408, 412 (1882);
Lewis v. United States, 146 U. S. 370, 372 (1892);
Diaz v. United States, 223 U. S. 442, 455 (1912);
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 307 (1937);
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393 (1937);
Johnson v. Zerbst, 304 U. S. 458, 464 (1938).

[12] *Patton v. United States*, 281 U. S. 276, 312 (1930).

Argument

(3) Denial of Advice of Counsel

It has already been related that when the petitioner was expelled from the court room upon the motion of the prosecutor, it was also directed that upon his return he should not be informed of the nature and outcome of the argument that had taken place. Accordingly it was only after he had returned, had resumed the witness stand without an opportunity to confer and was being cross examined again that his attorney was permitted to tell petitioner from the bar of the court of the existence of his constitutional protection against self-incrimination; even then they could not confer over the effect and advisability of claiming it. Having it put to him in this way, petitioner naturally claimed the privilege.

It is respectfully submitted that this was in direct contravention of the requirements of the Sixth Amendment guaranteeing to one charged with crime the assistance of counsel.

This right, of course, is "not formal, but substantial": *Johnson v. United States*, 110 F. 2d 562, 563 (D. C. C. A. 1940). In order to have any meaning whatever, the assistance of counsel must mean "effective assistance": *Thomas v. District of Columbia*, 90 F. 2d 424, 428 (D. C. A., 1937); *McDonald v. Hudspeth*, 41 F. Supp. 182 (D. C. Kan. 1941). Thus, the term must comprehend that the accused shall have the right not only to be represented by counsel at the trial, but also the right to confer with him "at all times": *Louie Yung v. Coleman*, 5 F. Supp. 702, 703 (D. C. Idaho, 1934).

As has been said frequently by this Court, the right of an accused to be heard "would be, in many cases, of little avail if it did not comprehend the right to be heard

by counsel": *Powell v. Alabama*, 287 U. S. 45, 68 (1932); *Johnson v. Zerbst*, 304 U. S. 458, 463 (1938). Further, the right to be heard by counsel includes the right of defendant "to give advice or suggestion, or even to supersede his lawyers altogether and conduct the trial himself": *Snyder v. Massachusetts*, 291 U. S. 97, 106 (1934). This being so, the right to counsel would similarly be of little avail if it did not mean that a defendant had the right to consult and advise with his attorney at *every* stage in the proceeding. And this Court has so held: *Powell v. Alabama*, supra, at p. 69; *Johnson v. Zerbst*, supra, at p. 463. "If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired": *Glasser v. United States*, 315 U. S. 60, 70 (1942).

It necessarily follows from our contention that petitioner had a constitutional right to be present and consult with his counsel at every stage in the trial, that he had the right to confer fully with him about the argument that had taken place since "the Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government": *Betts v. Brady*, 316 U. S. 455, 474 (1942).[13] This becomes even more important when it is realized that what had transpired constituted a crucial point in the trial.

It should be added that the Court in *Powell v. Alabama*, supra, at p. 70, indicated that "the right of the accused to the presence, advice and assistance of counsel [is] necessarily included in due process of law. 2 Story Const. 4th ed. § 1949, p. 668."

The government has hitherto argued that petitioner can have suffered no harm from the denial of his right to consult with his attorney since no request for such a

[13] See Mr. Justice Roberts' dissenting opinion in *Snyder v. Massachusetts*, 291 U. S. 97, 130-132 (1934).

conference was made and since in claiming his privilege petitioner did exactly what his attorney, according to the government, had attempted to do for him while he was excluded from the court room. The short answer to this contention is that no request for a conference was made because the court, pursuant to the motion of the prosecutor, had already directed that the petitioner not be informed about what had occurred. Further, as a result again of the prosecutor's motion that petitioner be excluded, his attorney necessarily had to bring to the attention of the court that the line of cross examination proposed by the government was objectionable, and would in all probability force the petitioner to claim his privilege. The anomalous situation is thus presented of the government forcing petitioner to leave the court room and then defending its action by saying the petitioner was not prejudiced since he ultimately and unconsciously adopted the position for which his attorney had argued in his absence.

The government's position must logically mean that any defendant who, without the advice of counsel, fortuitously takes a course of action which an attorney would have suggested to him, cannot be said to be prejudiced within the meaning of the Sixth Amendment by having been denied counsel. Such a result is "shocking to the universal sense of justice": *Betts v. Brady*, 316 U. S. 455, 462 (1942). Furthermore, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial": *Glasser v. United States*, 315 U. S. 60, 76 (1942).

(4) Impeachment of Petitioner's Credibility

Although the petitioner was indicted for wilfully attempting to evade and defeat his income taxes for the years 1935, 1936 and 1937 and for no other years, the prosecutor was permitted, solely for the purposes of impeaching his credibility, to cross examine him as to whether or not he had in 1938, received money from the numbers game, what he had done with it and whether or not he had used the same "bookkeeping system", as in previous years.[14] These questions were objected to since on their face they related to the commission of other crimes for which petitioner might be indicted at some later date. Nevertheless, he was compelled either to answer them or to claim his privilege. The error thus committed is succinctly demonstrated by the opinion of the dissenting Judge in the Circuit Court (R. 235):

[14] The printed record in this case contains the testimony of many witnesses explaining in detail the inner operation of the numbers business in Atlantic City. This testimony was totally irrelevant and had proper objection been made and exception taken, could very well have been assigned as reversible error: *United States v. Johnson*, 123 F. 2d 111, 125 (CCA 7, 1941), *cert. granted*, 315 U. S. 790 (1942), ordered reargued October 12, 1942. Though the government charged that the source of the payments made to petitioner were monies paid by those engaged in this illicit enterprise for protection, it was neither necessary nor relevant for the government to show anything more than the making of the payments, certainly not all the inside workings of the racket itself. It is very apparent that this evidence was introduced only for the purpose of creating an atmosphere antagonistic to the defendant. From the petitioner's point of view, it now has no bearing on the questions involved on this appeal. It has been printed at the request of the government and the purpose in requiring it to be printed is not at all clear to counsel for petitioner.

"It is less than clear to me how the matter thus inquired about can be deemed capable of serving as the basis for impeachment. Necessarily, even a possibility of refutation would depend upon how the defendant testified in such regard. If he told the truth, he could hardly be thought to have impeached himself, even though a conflict should incidentally develop upon a comparison of his testimony with extraneous matter. Yet, the irrelevant matter, which on the government's theory would constitute a separate offense for which the defendant was not on trial, would have been heard by the jury. On the other hand, if he testified falsely, the government would not be in position to refute him, for the cross examiner is bound by the answers which he elicits to questions concerning collateral matter."[15]

See in accord *Bullard v. United States*, 245 F. 837, 840 (C. C. A. 4, 1917) and *Cohen v. United States*, 56 F. 2d 28, 30 (C. C. A. 1, 1932).

In approving the line of questions relating to collateral offenses of which petitioner had not been convicted, the majority of the Circuit Court is in conflict with its own recent decision in *United States v. Montgomery*, 126 F. 2d 151 (1942), which, peculiarly enough, it cites in the present case (R. 229). The *Montgomery* case also arose in the District Court for the District of New Jersey and there too the question involved was the impeachment of a witness. The Circuit Court held (p. 155):

"It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the

[15] 125 F. 2d 954, 964 (1942).

light of general authority and sound reason. So treating with the question raised in the instant case, *we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility.*"

Compare *Melaragno v. United States*, 88 F. 2d 264 (C. C. A. 3, 1937) and cases there cited.

A fortiori the trial court and the Circuit Court were in error in permitting a series of questions relating to criminal offenses for which the petitioner had not even been indicted. Especially is this so since the questions were permitted not to show motive or intent, or a common scheme, but solely for the purpose of attacking petitioner's credibility (R. 139, 173).

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(5) The Perversion of the Privilege against Self-incrimination

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We contend that when the accused in a criminal case is permitted to exercise his constitutional right against self-incrimination, the question of its exercise is a matter solely between him and the trial judge in which the jury has no concern whatever; no inference may be drawn from the claim of privilege and consequently the jury may not be permitted to consider it in determining the credibility of him who invoked it.

In the present case, as has been described, the trial judge permitted the petitioner to be informed that he had a constitutional privilege against self-incrimination, without allowing him to confer with counsel over the effect

of claiming it. Then, after petitioner in this unenlightened state had been granted his privilege, the government attorney argued to the jury that the petitioner should not be believed because he refused to answer and the trial judge charged that the jury could consider the claim of privilege as affecting credibility. In this perverse fashion, petitioner's constitutional right instead of protecting him boomeranged against him in the most unexpected manner. "Of what worth would the protection be if a party availing himself of it incurred detriment or loss by so doing": *Harrison v. Powers*, 76 Ga. 218, 245 (1886).

As was said in the case of *Boyle v. Smithman*, 146 Pa. 255, 275, 23 A. 397, 398 (1892):

> "To extend to a defendant the formal protection of his privilege, and then allow the fact that he has claimed it to be used as affording a presumption against him, would be a sort of mockery of which the law is not guilty."

Likewise, in *State v. Froman*, 45 S. D. 465, 473, 188 N. W. 746, 749 (1922), the court said:

> "We are of the view that the right to claim exemption on the witness stand is as fully protected by the statute, which is merely a legislative interpretation of section 9, art. 6, of the Constitution, as is his failure to testify at all, and that the state is equally precluded from commenting on the fact of such claim being made as it is from commenting on the fact that the accused has failed to testify at all. We think no presumption arises or can be properly urged against the accused in either case without an invasion of his constitutional rights."

The case now before the Court must be distinguished from a case where the defendant takes the stand and after testifying for himself, "stops short" in his testimony and

fails to explain incriminating facts and circumstances already in evidence, relating to the very crime for which he is then being tried: *Caminetti v. United States*, 242 U. S. 470 (1916); *Krotkiewicz v. United States*, 19 F. 2d 421, 424 (C. C. A. 6, 1927). Similarly those cases must be distinguished which turn upon the question of whether the claim of privilege against self-incrimination is proper in the first instance, rather than upon the effect of its grant: *Raffel v. United States*, 271 U. S. 494 (1926); *Tomlinson v. United States*, 93 F. 2d 652 (C. A. D. C. 1937); cf. *Reagan v. United States*, 157 U. S. 301, 304, 305 (1895).

The rule we ask this Court to adopt was stated as long ago as *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853):

> "When a witness declines answering a question, upon the ground of its tendency to incriminate himself, the objection is addressed to the *Court*, and the decision upon it is to be made by the *Court*, and not by the *jury*. If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it. The exercise of this right by the witness is not under the control of the parties, and no one can be affected by evidence which his adversary fails to produce, and which, therefore, cannot be met or explained by cross examination, rebutting evidence, or otherwise. * * *"

See in accord *State v. Weber*, 272 Mo. 475, 482, 199 S. W. 147, 148, 149 (1917).

If the trial court and the Circuit Court are right in holding that the line of questions was proper, then there

was perhaps "probable error" in permitting the claim of privilege in the first instance since a defendant cannot claim privilege as to a *proper* line of cross examination: *Raffel v. United States*, supra, at p. 497. As the dissenting Judge said, however (R. 238):

> "But having been allowed by the court so to plead in this case, surely the defendant did not thereby subject himself to impeachment merely because he exercised a privilege which the court, even though mistakenly, accorded to him." [16]

It is true that no objection was made or exception taken to this portion of the charge. The Circuit Court considered the point, however, and it needs little citation of authority to show that, in order to prevent injustice, courts will, in criminal cases, correct a fundamental error even though the question was not properly saved: *Wiborg v. United States*, 163 U. S. 632, 658 (1896); *Crawford v. United States*, 212 U. S. 183, 194 (1909); *Burns v. United States*, 274 U. S. 328, 341 (1927); *Ayers v. United States*, 58 F. 2d 607, 609 (C. C. A. 8, 1932); see also *United States v. Atkinson*, 297 U. S. 157, 160 (1936); *Rose v. United States*, 128 F. 2d 622, 626 (C. C. A. 10, 1942).

Conclusion

For the reasons set out above, it is respectfully submitted that this Court should reverse the judgment of the Circuit Court of Appeals for the Third Circuit, set aside the judgment and sentence of the District Court and order a new trial.

William A. Gray,
Benjamin M. Golder,
Counsel for Petitioner.

[16] 129 F. 2d 954, 966 (1942).

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No. 273

In the Supreme Court of the United States

OCTOBER TERM, 1942

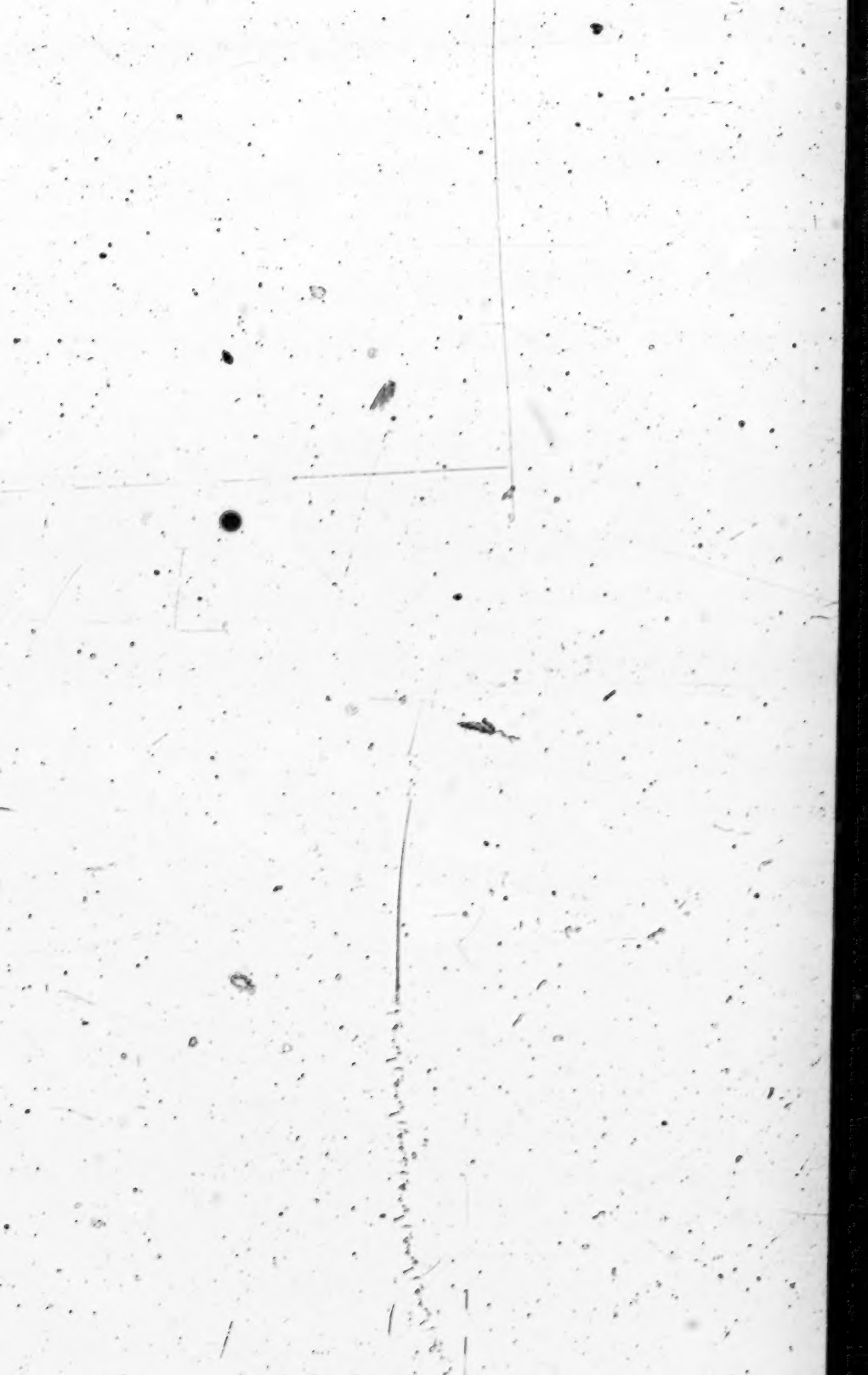
ENOCH L. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	16

CITATIONS

Cases:

Bonness v. *United States*, 20 F. (2d) 754	13
Boyd v. *United States*, 271 U. S. 104	16
Caminetti v. *United States*, 242 U. S. 470	15
Crowens v. *United States*, 62 F. (2d) 261, certiorari denied, 289 U. S. 733	14
Dias v. *United States*, 223 U. S. 442	10, 11
Dowdell v. *United States*, 221 U. S. 325	9
Fitzpatrick v. *United States*, 178 U. S. 304	15
Frank v. *Mangum*, 237 U. S. 309	10, 11
Gaines v. *Washington*, 277 U. S. 81	11
Krotkiewicz v. *United States*, 19 F. (2d) 421	15
Morris v. *United States*, 61 F. (2d) 520, certiorari denied, 287 U. S. 597	16
Raffel v. *United States*, 271 U. S. 494	14, 15
Reagan v. *United States*, 157 U. S. 301	15
Schwab v. *Berggren*, 143 U. S. 442	9
Snyder v. *Massachusetts*, 291 U. S. 97	8, 9, 10
Tinkoff v. *United States*, 86 F. (2d) 868, certiorari denied, 301 U. S. 689	13
Tomlinson v. *United States*, 93 F. (2d) 652, certiorari denied, 303 U. S. 646	15
United States v. *Cox*, 47 F. (2d) 988	9

478262—42——1

Statutes: Page

Act of March 16, 1878, c. 37, 20 Stat. 30 (U. S. C., Title 28, Sec. 632) 15

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 145 2

Miscellaneous:

VIII Wigmore on Evidence (3d ed.):

Sec. 2196 12

Sec. 2270 12

Sec. 2273 15

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OPINIONS BELOW

The opinions of the Circuit Court of Appeals[1] (R. 239–266) are as yet unreported. The oral opinion of the District Court on motion for new trial (R. 39–41) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 30, 1942 (R. 267). The petition

[1] Pursuant to stipulation the record in this Court for purposes of the petition for certiorari consists of printed appendices to the briefs of the petitioner and the respondent in the court below and the proceedings in that court. A copy of the entire transcript of the record is on file with the clerk of this Court. References to the volume of the printed appendices and proceedings below will be designated "R."; references to portions of the typewritten transcript will be designated "Tr."

for a writ of certiorari was filed on July 31, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

QUESTIONS PRESENTED

1. Whether the trial court erred in any manner with respect to the exclusion of the petitioner from the courtroom, while under cross-examination, during argument by counsel on a point of law while the jury was also absent.

2. Whether the trial court erred in permitting certain cross-examination of the petitioner for the purpose of testing his credibility.

3. Whether the trial court erred in charging that the jury might consider the petitioner's claim of privilege against self-incrimination during his cross-examination in testing the petitioner's credibility and good faith.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more

than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT

The petitioner was indicted in the District Court for the District of New Jersey on June 17, 1941 (R. 1), in an indictment containing three counts charging him with wilfully attempting to defeat and evade his income taxes for the calendar years 1935, 1936 and 1937 (R. 67–79). He was acquitted on the first count as to 1935 but was convicted on the second and third counts as to the years 1936 and 1937[1] (R. 5). The second and third counts each charged the petitioner with receiving large amounts of money from the numbers game which he failed to report (R. 71–79).

Except on the motion for new trial the petitioner at no time has challenged the sufficiency of the evidence to support his conviction on the second and third counts. He does not now make this contention. The errors urged, although several in number, arise out of a single incident at the trial occurring during the cross examination of the petitioner. The background and outline of this incident are as follows:

During the period covered by the indictment and for some time prior thereto the petitioner was the

[1] He was sentenced to five years' imprisonment and fined $10,000 on each count, the sentences to run consecutively (R. 6).

political leader of the Republican party in Atlantic City, New Jersey (R. 138). From approximately July 1935, to 1939 the numbers game operated in Atlantic City as a single syndicate (R. 93, 96–97, 118–120, 122–124; Tr. 972–976). Two members of the syndicate, Weloff and Towhey, testified that from shortly after its formation to November 1937, acting alternately, they made weekly payments of $1,200 to the petitioner on behalf of the syndicate for protection (R. 94–98, 120–125, 127–128).

In November of 1937 the numbers backers relieved Weloff and Towhey of the duty of making the weekly payments, and gave it to another member of the syndicate called Southern (R. 99–101, 128), who was called as a court's witness (Tr. 865–871). He testified that after he took over the weekly payments from Weloff and Towhey he made no payments to Johnson but paid the weekly amount of $1,200 to a police inspector named Ferretti (Tr. 874–875, 881–887). Ferretti was dead at the time of the trial (Tr. 875). The syndicate continued to make weekly payments of the same amount until 1939 (R. 123–124; Tr. 822–823, 973–975).

The petitioner, on taking the stand, admitted that he had received the weekly payments from Weloff and Towhey from sometime in 1935 until November 1937 (R. 141, 144–145, 151). He denied, however, that it was paid to him for protection and asserted that it was paid for the purpose

of maintaining his personal political organization in order to secure the election of officials friendly to the numbers game (R. 140, 141–142). Thereafter he testified that he regularly expended moneys received from the numbers game for the expenses of his personal political organization, that he noted the balances remaining after such expenditures periodically on memoranda slips and sent these to his secretary for safekeeping, that when he prepared his income tax returns these slips were totalled and the total reported on his returns as "Commissions" and that these items of income on his 1935, 1936 and 1937 income tax returns represented the balance of numbers money received by him, after political expenditures, which he had appropriated to his own use (R. 144–154). Finally Johnson stated that he did not return the full amount of the numbers money because he did not consider that he owed on the entire amount (R. 156).

On cross-examination Johnson was questioned as to the system described of recording expenditures for his political organization and of keeping memoranda of the net balances of the numbers money (R. 175–181). On being asked how long he kept up the practice as to the memoranda, over objection, he stated that he carried it on through 1938 (R. 181–182). Next, Johnson admitted that he received the $1,200 during each week in 1936 but he then denied that he received the $1,200

every week in 1937 and that he had received it from Southern after Weloff stopped making the payments (R. 185–186).

Shortly thereafter Johnson was asked if he received any money from numbers in 1938 (R. 188). Objection followed and was overruled and Johnson answered, "Yes" (R. 189–190). There immediately followed the question, "Who gave it to you?" Counsel for Johnson then objected and asked that the question be argued. After argument started he further requested that the argument be made in the absence of the jury and the jury was accordingly excused. Counsel for the Government then requested that since the jury was not present the defendant also be excused and that he resume the stand without having an opportunity to hear what the argument was about. The court stated that this was a fair request and directed the petitioner to retire. He withdrew without objection by him or on his behalf (R. 190–191).

Counsel for both parties then argued at length on the propriety of the line of cross-examination and the privilege of the petitioner to refuse to answer on the ground of self-incrimination. Finally, the court ruled that the cross-examination was proper to test the petitioner's credibility but that his counsel could advise him of his right to claim the privilege against self-incrimination (R. 191–202).

On the jury's and the petitioner's return to the courtroom the question, "Who gave it to you" was repeated (R. 202). Petitioner's counsel then advised him of his privilege and the petitioner claimed the privilege (R. 202–203). After the petitioner had stated that during November and December of 1937 he paid his political expenses out of accumulated funds, he was asked what money he used for this purpose in 1938 and again claimed privilege (R. 204). Next, over objection, he identified his 1938 income tax return and testified that it contained an item of "Other commissions" as part of his income (R. 206–208). On being asked what money that represented he once more claimed privilege (R. 208). This closed the incident.

In summation, counsel for the Government commented at some length on the petitioner's claim of privilege (R. 61–62; Tr. 1910–1915). The trial court charged that the claim of privilege could only be considered by the jury in testing the petitioner's credibility and his good faith (R. 8).

The Circuit Court of Appeals affirmed the conviction (R. 267). The prevailing opinion held that the trial court did not commit error in excluding the petitioner from the courtroom, that the cross examination of the petitioner as to 1938 was proper and that no error was committed by the trial court in charging that the jury might consider the petitioner's claim of privilege in testing his credibility and good faith (R. 250–256). Judge Goodrich

478262—42——2

filed a separate concurring opinion on the issue as to the petitioner's presence (R. 257). Judge Jones dissented chiefly on the ground that the permission of cross-examination as to 1938 constituted reversible error (R. 257–266).

ARGUMENT

1. The petitioner first contends that his absence from the courtroom as previously described during argument of counsel to the court in the absence of the jury was in violation of his constitutional rights and hence constituted reversible error (Pet. 5–6, Br. 15–22). Although a defendant's privilege to be present during proceedings for the determination of his guilt or innocence is not found in any express constitutional provision, it has been implied in the due process and fair trial provisions of the Fifth and Sixth Amendments. The scope of this privilege has been exhaustively considered in *Snyder* v. *Massachusetts*,[1] 291 U. S. 97, and the test of the existence of the privilege at any given stage of the proceedings was held to be whether the defendant's "presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge" (291 U. S. at pp. 105–106).

[1] This case involved a state proceeding and hence the extent of the privilege of presence under the Fourteenth Amendment. The privilege under the Fifth and Sixth Amendments, however, has been treated as coextensive. See *Snyder* v. *Massachusetts*, *supra*, at pp. 105–106, 128–134, and cases cited therein.

The decision of the court below is proper under this test. In the *Snyder* case the jury, accompanied by the judge and counsel on both sides of the case, inspected the scene of the crime. Notwithstanding his request to do so, the accused was not permitted to be present, and his absence was held not to deny him due process, because it did not injure his defense. The instant case is much clearer, since here both the jury *and* the accused were absent from the courtroom. Furthermore, during their absence all that transpired was argument between counsel as to the propriety of the cross-examination of the accused by government counsel and discussion between petitioner's counsel and the trial judge as to whether petitioner must claim the privilege against self-incrimination or whether his counsel could do it for him.*

It is apparent also that the instant case does not contain the element which caused the dissenting justices to disagree with the *Snyder* decision, since here no evidence was presented to the jury in the absence of the accused.

Petitioner's contention that he had an absolute right to be present at every stage of the proceed-

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* Thus the petitioner's absence here was no more injurious to his defense than would be his absence during the argument of an appeal or a preliminary motion, when he would have no right to be present. Cf. *Doudell* v. *United States*, 221 U. S. 323; *Schaub* v. *Berggren*, 143 U. S. 442, 449; see *Snyder* v. *Massachusetts*, *supra*, pp. 107, 129; *United States* v. *Cox*, 47 F. (2d) 966 (C. C. A. 9th).

ings is derived from general statements in some early cases which were not necessary to the decisions therein. These statements have since been departed from by this Court (see *Diaz* v. *United States*, 223 U. S. 442, 458–459; *Frank* v. *Mangum*, 237 U. S. 309, 340–341; *Snyder* v. *Massachusetts*, *supra*, pp. 106, 117).

Petitioner claims that injury was done to him because had he not been excluded from the courtroom he might have been able to offer advice and suggestions to his counsel (Pet. 19). An identical claim was rejected by this Court in *Snyder* v. *Massachusetts*, *supra*, at p. 113, on the ground that the record showed that the presence of the accused could not have been an aid to his defense. The record here makes the same showing; all that occurred in the absence of petitioner and the jury was the argument of points of law.

2. The court below did not base its decision, as the petitioner appears to assert (Pet. 6–7; Br. 22–23), on the ground that he had waived any constitutional right of presence. It simply listed the defendant's acquiescence as one factor supporting its conclusion that the petitioner was not harmed by his exclusion from the courtroom during the argument (R. 250). Accordingly, this contention of the petitioner affords no ground for the granting of certiorari. Moreover, this Court has held that where the charge is not a capital one and the defendant is free on bail, he may waive the privilege

of presence and the trial may proceed in his absence. *Diaz* v. *United States, supra,* p. 455; *Frank* v. *Mangum, supra,* p. 343; *Gaines* v. *Washington,* 277 U. S. 81. Petitioner was free on bail (R. 1) and the charge was not a capital one. Therefore petitioner's failure to object to his exclusion did constitute an effective waiver of the privilege of presence.

3. The petitioner further maintains that the result of the incident in question was to deprive him of the assistance of counsel in violation of his constitutional rights under the Sixth Amendment (Pet. 7–8; Br. 23–24). A recital of the facts reveals the lack of foundation for this claim. As the line of cross-examination began counsel for the petitioner was vigorously objecting to each question. He requested argument on the point in the absence of the jury. The request of Government counsel that the defendant withdraw and return without being apprised of the nature of the argument followed.* The trial judge stated that the request was a fair one but his order was simply that the petitioner retire (R. 188–191). In the course of the argument petitioner's counsel urged that even if the cross-examination were otherwise

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*The reason for the request by Government counsel becomes apparent when it is noted that just prior to the incident in question counsel for the petitioner volunteered testimony for the petitioner and was reprimanded by the trial court for objecting in a manner to intimate to the petitioner the answers he should make (R. 185–187).

proper the petitioner was entitled to claim privilege (R. 196). The judge stated that the petitioner and not his counsel was the one permitted to claim the privilege. His counsel nevertheless persisted in objecting to the cross-examination on the ground that it tended to incriminate him (R. 197). The court ruled correctly, however, that counsel might advise the petitioner of his rights but that petitioner would have to determine for himself whether he would claim the privilege (R. 201). See VIII Wigmore on Evidence (3d ed.), Secs. 2196, 2270. The record reveals that when the petitioner resumed the stand he was advised of his privilege by his counsel and that he claimed it (R. 202–208).

Thus the facts are that petitioner's counsel attempted to claim the privilege for petitioner, and made this attempt without asking to consult his client. The court refused to permit petitioner's counsel so to bind him; petitioner himself was told of his privilege and elected to claim it. In doing so, he did precisely what his counsel had previously attempted to do for him. In view of these facts, petitioner's present suggestion that he was injured by not being permitted to hold a strategy conference with his counsel is groundless. Furthermore, no request for an opportunity to hold such a conference was made.

4. The fourth contention of the petitioner is that the trial court erroneously permitted cross-exam-

ination of him as to offenses for which he had not been but could be indicted (Pet. 8–9; Br. 24–26). He asserts that a conflict exists between this decision and prior decisions of the same court. The line of cross-examination thus assailed, however, was not an attempt to impeach the petitioner merely by proof of another crime within the prohibition of the cases cited by petitioner. The petitioner had admitted receipt of the numbers money in 1935, 1936 and 1937 and had described a system of recording his expenditures from and net balances of this money and reporting the latter on his income tax returns. He denied receiving any such money in November and December of 1937. It will be recalled that the syndicate's method of making protection payments (though Weloff and Towhey) was changed in November 1937, and that, as changed it continued from November 1937, through the year 1938. (*Supra*, p. 4.) Since Johnson denied having received any of those payments under the new system in November and December of 1937, it was relevant to inquire whether he had received any such payments in 1938 when the new system was likewise in operation. The questions as to 1938 were therefore proper cross-examination as a check upon the truthfulness of Johnson's answers with respect to November and December of 1937. *Bonness* v. *United States*, 20 F. (2d) 754 (C. C. A. 9th); *Tinkoff* v. *United States*, 86 F. (2d) 868 (C. C. A. 7th), certiorari denied, 301 U. S. 689; and

see additional cases cited in opinion below, R. 252–253. Since the questions were thus relevant and otherwise proper they were not rendered improper by any possibility that they might tend to impute to the petitioner the commission of another crime. *Cravens* v. *United States*, 62 F. (2d) 261 (C. C. A. 8th), certiorari denied, 289 U. S. 733.*

5. As a final point the petitioner maintains that the trial court erred in charging the jury that it might consider his claim of privilege against self-incrimination in testing his credibility as to the answers which he did give and his good faith. (Pet. 9; Br. 26–28). This charge was given as a limitation on comment made by the prosecution (R. 8).

An accused's privilege against self-incrimination permits him to refrain from testifying entirely but when he does voluntarily take the stand he is held to have waived his privilege, "and within the limits of the appropriate rules he may be cross-examined as to the facts in issue." *Raffel* v. *United States*, 271 U. S. 494, 497. The privilege of the accused has been reinforced by statute which prohibits the creation of any presumption against him from his failure to be a voluntary witness. Act of March 16, 1878, c. 37, 20 Stat. 30 (U. S. C., Title 28, Sec. 632). As with the privilege, however, the

* Moreover, the carefully framed charge to the jury (R. 23–24) eliminated any possibility of its misuse of this line of testimony.

prohibition against adverse inference ends with the defendant's taking the stand and fair comment upon his testimony thereupon becomes proper. Thus in *Caminetti* v. *United States*, 242 U. S. 470, a defendant, Diggs, took the stand but stopped short in his testimony and made no explanation as to a material part of the case. The trial court charged that the jury might consider his failure to testify further in reaching their conclusion as to his guilt or innocence. This Court held that charge to be proper (242 U. S. pp. 492–495). See also *Raffel* v. *United States*, 271 U. S. 494; *Fitzpatrick* v. *United States*, 178 U. S. 304, 315–316; *Reagan* v. *United States*, 157 U. S. 301, 304–311; *Tomlinson* v. *United States*, 93 F. (2d) 652 (App. D. C.), certiorari denied, 303 U. S. 646; *Krotkiewicz* v. *United States*, 19 F. (2d) 421 (C. C. A. 6th). The charge of the trial court here was carefully calculated to prevent the jury's drawing any general inference of guilt as to the crimes charged from the claim of privilege. It left open for the jury the inference that the petitioner's refusal to answer questions as to 1938 resulted from the fact that the answers to such questions would reveal the falsity of the answers as to the prior years. The court's charge was thus entirely within the holding of the *Caminetti* case and was proper. See VIII Wigmore on Evidence (3d ed.) Sec. 2273 (4).

The record discloses further that the petitioner took no exception to this portion of the court's

charge (R. 33–39, and see Tr. 1963–1966), although a number of other exceptions were taken and additional instructions were given by the court in response to some of them (R. 33–39). The petitioner, therefore, may not now assert error as to the instruction challenged. *Boyd* v. *United States*, 271 U. S. 104, 108; *Morris* v. *United States*, 61 F. (2d) 520 (App. D. C.), certiorari denied, 287 U. S. 597.

CONCLUSION

The decision below is in all respects correct and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

Respectfully submitted.

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No. 278

In the Supreme Court of the United States

October Term, 1942

EDWIN L. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Summary of argument	10
Argument	16
I. The court did not err in permitting cross-examination of petitioner concerning his receipt of money from the numbers syndicate in 1938, and his accounting practices in that year	19
II. Petitioner was not entitled to hear the argument to the court upon the propriety of the questions being asked him on cross-examination and was not denied any right to consult with his attorneys concerning what occurred	27
A. The right to presence	32
B. The right to counsel	37
III. The trial court did not err in permitting the jury to consider, in determining petitioner's credibility, his refusal to answer relevant questions on the ground that the answers would tend to incriminate him	40
IV. The judgment of conviction should be affirmed regardless of whether there was error in hearing argument in the petitioner's absence during cross-examination or in permitting the jury to consider petitioner's claim of privilege against self-incrimination in testing his credibility	47
A. The right to presence and to assistance of counsel	49
B. The charge	52
Conclusion	54

CITATIONS

Cases:

Adams v. *State*, 29 Fla. 311	33
Alexis v. *United States*, 129 Fed. 60	34
Avery v. *Alabama*, 308 U. S. 444	39
Brasfield v. *United States*, 272 U. S. 448	48

Cases—Continued.

	Page
Brooks v. *State*, 77 Tex. Cr. R. 517	35
Bruno v. *United States*, 308 U. S. 287	42
Boyd v. *United States*, 271 U. S. 104	54
Burns v. *United States*, 274 U. S. 328	48
Caminetti v. *United States*, 242 U. S. 470	44
Clyatt v. *United States*, 197 U. S. 207	48
Commonwealth v. *Nichols*, 114 Mass. 285	42
Crawford v. *United States*, 212 U. S. 183	48
Cravens v. *United States*, 62 F. (2d) 261, certiorari denied, 289 U. S. 733	26
Devoe v. *United States*, 103 F. (2d) 584	26
Diaz v. *United States*, 223 U. S. 442	49
Dowdell v. *United States*, 221 U. S. 325	34
Fitzpatrick v. *United States*, 178 U. S. 304	46
Frank v. *Mangum*, 237 U. S. 309	36, 49
Funk v. *United States*, 290 U. S. 371	36
Gaines v. *Washington*, 277 U. S. 81	49
Glasser v. *United States*, 315 U. S. 60	50, 51
Hagood v. *Commonwealth*, 157 Va. 918	35
Hopt v. *Utah*, 110 U. S. 574	49
Johnson v. *Zerbst*, 304 U. S. 458	48, 49, 50
Krotkiewicz v. *United States*, 19 F. (2d) 421	45
Lee v. *State*, 161 S. W. (2d) 290	35
Mehan v. *United States*, 112 F. (2d) 561	26
Moore v. *United States*, 150 U. S. 57	26
Palmer v. *Commonwealth*, 143 Va. 592	35
Patton v. *United States*, 281 U. S. 276	51
People v. *Dupounce*, 133 Mich. 1	42
Powers v. *United States*, 223 U. S. 303	42
Rafel v. *United States*, 271 U. S. 494	40, 42, 45, 46
Reagan v. *United States*, 157 U. S. 301	45
Sawyer v. *United States*, 202 U. S. 150	42
Schwab v. *Berggren*, 143 U. S. 442	32, 34
Shettel v. *United States*, 113 F. (2d) 34	26
Snyder v. *Massachusetts*, 291 U. S. 97	12, 33, 34, 35, 37, 49
State v. *Bailey*, 27 N. M. 145	42
State v. *Griffin*, 201 N. C. 541	42
State v. *Hall*, 55 Mont. 182	35
State v. *Kent*, 5 N. D. 516	42
State v. *Klinke*, 46 Minn. 343	42
State v. *Maxwell*, 151 Kan. 951	36
State v. *Ober*, 52 N. H. 459	42, 46
State v. *Sutler*, 71 W. Va. 371	35
State v. *Wentworth*, 65 Me. 234	42
Tiller v. *State*, 96 Ga. 430	35
United States v. *Atkinson*, 297 U. S. 157	47

Cases—Continued. Page

United States v. *Buckner*, 108 F. (2d) 921, certiorari denied, 309 U. S. 669 54
United States v. *Cox*, 47 F. (2d) 988 34
United States v. *Mahoney*, 43 F. Supp. 943 34
United States v. *Marion*, 107 F. (2d) 834, certiorari denied, 309 U. S. 664 53
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 48
Weems v. *United States*, 217 U. S. 349 48
Weiss v. *United States*, 122 F. (2d) 675, certiorari denied, 314 U. S. 687 26
Wiborg v. *United States*, 163 U. S. 632 48
Wong Tai v. *United States*, 273 U. S. 77 54
Zimmerman v. *Commonwealth*, 167 Va. 578 35

Statute:

Revenue Act of 1936, c. 690, 49 State 1648, Sec. 145 (b) .. 3

Miscellaneous:

Cooley, *Constitutional Limitations* (3d ed.), p. 317 44
VIII Wigmore, *Evidence* (3d ed.), §§ 2272, 2272a, 2273, 2276 ..... 45, 46, 47

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 273

ENOCH L. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion (R. 217–232), concurring opinion (R. 233), and dissenting opinion (R. 233–241) in the circuit court of appeals are reported at 129 F. (2d) 954. The oral opinion of the district court denying a motion for a new trial (R. 200–202) is unreported.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 30, 1942 (R. 242). The petition for a writ of certiorari was filed on July 31, 1942, and was granted October 12, 1942 (R. 244–

499877—43——1

245). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether it was error to permit cross-examination of petitioner concerning his receipt of money from the numbers syndicate in 1938 and his practice in accounting therefor.

2. Whether petitioner was entitled to hear argument to the court upon the propriety of the questions being asked him on cross-examination, and whether the procedure adopted for that purpose denied him opportunity to consult with his attorneys concerning what occurred before resuming the witness stand.

3. Whether it was error to permit the jury to consider, in determining petitioner's credibility, his refusal, after taking the stand, to answer relevant questions on the ground that the answers would tend to incriminate him of another crime.

4. Whether petitioner should be granted a new trial for any error in the procedure followed during his cross-examination or in the charge concerning his claim of privilege, notwithstanding his complete acquiescence at the trial.

STATEMENT

Petitioner was indicted in the District Court for the District of New Jersey in an indictment containing three counts charging him with wilfully attempting to defeat and evade his income

taxes for the calendar years 1935, 1936, and 1937 in violation of Section 145 of the Revenue Acts of 1934 and 1936 (R. 5–15).[1] He was acquitted for 1935 but was convicted on the second and third counts for 1936 and 1937 (R. 4). He was sentenced to five years' imprisonment and fined $10,000 on each count, the sentences to run consecutively (R. 202–203).

Although petitioner has at no time suggested that the verdict was unwarranted, it is important to summarize the evidence in the case because it is directly relevant to the errors urged.

The theory of the Government's case on the second and third counts was that petitioner, Johnson, who, throughout the period, was the leader of the dominant political party in Atlantic City and Atlantic County, New Jersey (R. 95), had received large sums of money from those conducting the numbers game for protection against police interference, and had not reported these sums for

---

[1] Revenue Act of 1936, c. 690, 49 Stat. 1648; provides in part:

"SEC. 145. PENALTIES.

* * * * * * *

"(b) * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

There is no question in this litigation involving interpretation of this section.

income-tax purposes. The Government's evidence was as follows:

Prior to 1935 the numbers game had been operating in Atlantic City through several independent banks. One of the numbers backers, Weloff, testified that beginning in 1933 or 1934 he began to deliver weekly payments to petitioner on behalf of the various numbers banks for protection. On making the first payment he told petitioner that the numbers backers wanted to go along without being molested by the police and wanted to keep outsiders from getting into the business. Petitioner replied, "I understand the situation and I think it will be all right." These payments, $125 by each day bank and later an additional $75 by the night bank, continued until May 1935 and during most of the period totalled $825 weekly (R. 37–38; see also R. 77–78).

In May 1935 the numbers bank in which Weloff and one Towhey were partners split up and a competitive price war ensued, stopping the protection payments (R. 41–43). Weloff asked petitioner to intercede (R. 42) and petitioner called Towhey, but Towhey refused to settle his differences with Weloff (R. 78–79). Finally, late in June of 1935 the numbers backers met and agreed to pool their operations (R. 43–45, 79–84).

Thereafter, until 1939, the numbers game thus operated as a single syndicate, the gross business of which averaged $1,800,000 a year (R. 32, 43–44,

79–81, 83, 85; Tr. 822–823, 973–975). Shortly after the formation of the syndicate, Weloff and Towhey, acting alternately began to deliver on behalf of the syndicate weekly payments of $1,200 to petitioner for protection; $150 a week was paid by each bank (R. 46–47, 81–82, 90). When the arrangement was explained to Johnson, he said that he was pleased that the numbers backers had gotten together and that it was all right with him as long as they eliminated all trouble among themselves and could meet the obligation of $1,200 a week (R. 46–47, 81–82, 90). During the same period the syndicate made additional yearly contributions to petitioner for election campaign expenses of $1,500 (R. 50). Johnson asked Weloff for these contributions (R. 50).

Weekly protection payments of $1,200 were made through 1937 and 1938 (R. 33–34, 59), but in November 1937 the numbers backers relieved Weloff and Towhey of the task of delivering the weekly payments and gave it to another member of the syndicate named Martin Michael, called Jack Southern (R. 33–34, 48–49, 86–87). The Court called Southern as a witness. Neither party would vouch for him (R. 61). He denied that he ever made any weekly payments to Johnson. He admitted that he knew that the protection payments had been made by the syndicate and that a meeting was held in the fall of 1937 at which it had been decided that he would

handle the payments rather than Weloff or Towhey. He stated that he did not know to whom the payments were being made at that time and that there was no discussion of this at the meeting. According to his testimony, a day or so after the meeting he was called to the office of an inspector of police named Ferretti and told by Ferretti to bring the money to him. He said that thereafter he made the weekly payments to Ferretti. Ferretti was dead at the time of the trial. (R. 61–71.)

The amounts of income received by petitioner from the protection payments greatly exceeded the sums included in his returns. His defense was that his omission to return all the income resulted from the mistaken but sincere belief that he was obliged to return only the net balance appropriated to his own use after deducting amounts expended for political purposes.

Petitioner took the stand in support of this defense and testified that the numbers money was paid to him for political purposes alone (R. 98). He said that he regularly expended moneys received from the numbers game for the expenses of his personal political organization, that he noted on memoranda slips the balances remaining after such expenditures and sent the slips to his secretary for safekeeping, that when he prepared his income tax returns these slips were totalled and the totals were reported on his returns as "Commissions" and that consequently the items so designated on his 1935, 1936, and 1937 income tax returns repre-

sented the balance of numbers money after deduction of political expenditures, and were the only amounts which he had believed subject to tax (R. 100–109). His direct examination as to this system, however, was carefully limited to the period prior to November 1, 1937. He admitted that he had received the weekly payments from Weloff and Towhey up to that date (R. 96–98), but he did not say whether he had received payments from the syndicate after November 1, 1937, when Southern was delivering the money.

On cross-examination petitioner was questioned concerning the extent of his practice of recording income and expenditures on memoranda slips. It was brought out that he applied the system only to the weekly numbers payments and not to the political contributions made once a year (R. 122, 130). Petitioner also testified, after objections were overruled, that he followed the same system in 1938 (R. 126). Still over objection, he answered that he had received numbers money in 1938, although he categorically denied that he had received payments in November and December 1937 (R. 129, 131). When asked who paid him the numbers money in 1938, he claimed his privilege against self-incrimination and the answer was not compelled (R. 140). He also claimed privilege in response to a request that he state what money was represented by the item "Other Commissions" in his 1938 return, which paralled the item "Com-

missions" in his returns for the three previous years (R. 143). One of petitioner's contentions is that the Court erred in permitting these questions to be asked.[2]

During this sequence of questions petitioner's attorney objected and asked for an opportunity to argue in the absence of the jury his objection that the questions were improper. The prosecutor then requested that since the jury was not to be present the petitioner should also be excused and that he should resume the stand without having an opportunity to hear what the argument was about. The court stated that this was a fair request and directed the petitioner to retire. He withdrew without objection by himself or on his behalf. After hearing argument, the court ruled that the cross-examination was proper to test the petitioner's credibility, but that his attorney could advise him of his right to claim the privilege against self-incrimination. Counsel did so advise him. (R. 131–139.) Petitioner contends that he was deprived of his constitutional rights by this incident, and that he is therefore entitled to a reversal. He made no such suggestion at the time.

During the latter part of the petitioner's cross-examination he testified that all of his political activities during the three years in question were financed out of the numbers money. When asked

[2] The relevant facts with regard to this cross-examination and the issue arising out of it are set forth in detail, pp. 19-25 *infra*. Consequently, they are only summarized here.

again what moneys he used for these expenses after the payments stopped in November 1937, he replied that they were paid out of accumulated funds. He further said that he did not know why the money stopped in November and that he had not tried to find out (R. 148–149). In response to questions by the court he admitted that he had made no study of the income tax law, that he had not asked his accountant whether the political expenses were deductible and that he had never given a thought to whether they were deductible. He said that he knew some deductions were allowable and that he based his belief that the political expenses were deductible upon general information and not upon any examination of the income tax law, consultation with anyone or anything he had read or heard (R. 153, 157–158).

The testimony of petitioner's secretary and of the accountant who prepared the returns tended to corroborate petitioner's story of recording items of income on memoranda slips and of totalling them to reach the amount listed as "Commissions" on the income tax returns. Neither had been told what the source of this item was, although they had detailed information as to his other items of income and deductions. The Government had called these witnesses, and claimed surprise. It was allowed to impeach their testimony concerning the preparation of the returns by the introduction of the testimony given by them before the grand

jury, which was in direct conflict with their testimony at the trial (R. 15–31).

In summation, counsel for the Government commented on petitioner's claim of privilege, urging that the refusal to give relevant testimony showed that petitioner's evidence could not be believed (R. 167–168). The trial court charged that the claim of privilege could be considered by the jury only in testing petitioner's credibility and his good faith (R. 173–174). Although he took no exception when the charge was delivered, petitioner now urges that this instruction was prejudicial error.

The circuit court of appeals affirmed the conviction (R. 242). The prevailing opinion held that the cross-examination of the petitioner as to 1938 was proper, that the trial court did not commit error in excluding the petitioner from the court room, and that no error was committed by the trial court in charging that the jury might consider the petitioner's claim of privilege in testing his credibility and good faith (R. 217–232). Judge Goodrich who concurred in the opinion of the court on the other issues, filed a separate concurring opinion on the issue of the petitioner's presence (R. 233). Judge Jones dissented (R. 233–241).

SUMMARY OF ARGUMENT

I

It was not error to permit petitioner to be questioned on cross-examination concerning his

receipt of numbers money in 1938 and his practice in accounting for it. Petitioner had testified on direct examination that he had received weekly payments from the numbers syndicate until November 1, 1937 and that he had included the balance remaining after political expenditures under the heading "Commissions" in his return. By implication he had denied receiving numbers money in November or December 1937. The questions concerning 1938 elicited proof that that denial was untrue because the answers established that in 1938, just as before November 1937, petitioner received weekly numbers payments. Other evidence showed that the syndicate disbursed the regular weekly sums in November and December also. Hence, in the absence of any explanation to the contrary, it was a fair inference from the proof showing an established practice continuing after 1937 that petitioner, notwithstanding his denial, had in fact received the payments during those two months. The questions were therefore relevant and material. That being true, they were not rendered incompetent by the possibility that the answers would show petitioner to be guilty of evading his income tax in 1938, a year not covered by the indictment. It is settled law that questions otherwise proper do not become improper merely because they tend to show that the defendant is also guilty of other crimes.

II

It was not error to hear argument in petitioner's absence on the objection to the cross-examination. The objection came at a critical point and argument upon it would call for the prosecutor to explain the purpose of his questions, the answers he expected and their effect upon the case. The court was not obliged to hear argument. It might have retired to study the matter or have called a conference with counsel at the bench. Having consented to hear argument, the court could properly take steps necessary to avoid prejudicing either party. To protect petitioner, the jury was excused, as his counsel requested. To preserve the effectiveness of the cross-examination, petitioner was excused, as the prosecutor suggested, so that the accused should not gain advance information of the nature of the attack upon his credibility as a witness.

It is established by *Snyder* v. *Massachusetts*, 291 U. S. 97, that the right of presence is not so absolute, at least when the jury is out, as to preclude so fair a regulation of trial procedure. When a point of law is raised, the right of the defendant to be present depends on whether the possible advantage to him in his defense is outweighed, as it was in the instant case, by the certain prejudice to the public. Moreover, even if the question be approached with a view to determining what is part of the "trial," the result must be the same. As stated in the dissenting opinion in the *Snyder* case,

the "trial" in this sense is the submission of data to the jury that is to play its part in striking the balance between the accused and the Government. When conferences are held at the bench or in chambers, or when argument is had in the court-room outside of the hearing of the jury on questions of law, the "trial" is in effect recessed while the judge is considering his ruling, just as it would be if he retired to his library to study the point.

Nor was petitioner denied the assistance of counsel by this procedure. The court could not know in the absence of a request that consultation was desired, and no such request was made. But even if the court had foreclosed the possibility of any consultation that would disclose the direction the cross-examination was to take—which is the most extended interpretation that the record will bear—such a ruling would have been a proper regulation of trial procedure designed to preserve in its historic scope the effectiveness of cross-examination.

III

The inference which counsel impressed upon the jury during argument and which the judge permitted it to draw was not that petitioner's claim of the privilege against self-incrimination showed that he was guilty of another crime and therefore could not be believed. The inference was that petitioner's refusal to give relevant information showed that the answers would injure his case by proving that he received numbers payments in November

and December of 1937, an allegation which he had denied; therefore that he had testified falsely in making the denial.

It was not error to allow the jury to draw this inference. When petitioner took the stand he waived his privilege entirely and subjected himself to the rules applicable to any witness. If he had simply failed to answer pertinent inquiries, it would have been a proper subject of comment. The fact that his refusal was due to a claim of privilege erroneously allowed does not alter the right to comment on the refusal to answer. Any pressure to incriminate himself of the other crime was a foreseeable consequence of the initial decision to waive his privilege and take the stand. For petitioner knew that he would be questioned on all relevant matters. The court did not mislead petitioner by allowing him to claim his privilege. The court simply permitted him to refuse to answer and, under such circumstances, it could not be inferred from the allowance of the privilege that no adverse inference would be permitted to be drawn from the refusal to give pertinent information.

IV

Regardless of whether there was error in hearing argument in petitioner's absence during cross-examination or in permitting the jury to consider his claim of privilege against self-incrimination in determining his credibility, the judgment of con-

viction should be affirmed. It is familiar law that questions not raised in the trial court may not be assigned as grounds for reversal on appeal. Although exceptions to this rule have been recognized in criminal cases, especially where constitutional rights are at stake, we are aware of no instance in which the court has granted a new trial to a defendant who was represented by counsel, even for an alleged deprivation of his constitutional rights, where timely objection might have avoided the error and no unfairness occurred.

This principle forecloses petitioner's contention that there was reversible error in the charge. The instruction of which he complains was given after previous warning to counsel. Yet no objection was made at that time and no exception taken after the charge; the question was not raised until the argument before the circuit court of appeals. The instruction may have been favorable to petitioner and, since he acquiesced in it, he may not now complain.

Likewise, petitioner's conduct during the trial makes plain that he acquiesced in the procedure suggested by the trial court and waived whatever right he may have had to protest. Petitioner was represented by attorneys who vigorously defended him. They would have protested promptly if they had sensed unfairness or disadvantage in the suggestion that petitioner withdraw during the argument and return without consulting his attorneys

to learn what had occurred. Their acquiescence, first in the suggestion and then in the court's approval of it shows plainly that they believed the suggestion to be reasonable and did not wish to question it.

ARGUMENT

Introductory.—Petitioner has at no time questioned the sufficiency of the evidence to support the conviction. The proof of guilt was exceedingly strong. Petitioner admitted receiving $62,400 from the numbers syndicate in 1936 and $50,400 in the first ten months of 1937. The only issue before the jury was the truth of petitioner's testimony that the items "Commissions" on his income tax returns reflected the amount of numbers money remaining after political expenditures, and that he had in good faith supposed that he was not required to return the full amount received. He related an elaborate story of entering the balance of numbers money remaining each week on a slip of paper marked "income," which his secretary kept in a box, and of adding the amounts shown on the slips at the end of the year to reach the amount of the "Commissions" returned. On its face, this explanation was incredible. And the only witnesses whose evidence tended to corroborate it were impeached by reading their contrary testimony before the Grand Jury. On cross-examination, moreover, petitioner's own testimony

was shown to have been fabricated to meet the Government's proof. Information elicited from him established by unavoidable inference that he had received weekly payments in November and December 1937. Petitioner did not claim to have kept any record of that income, a fact which was inconsistent with his prior testimony for he had had no reason to abandon the system which he said that he had followed. The Government argued, and the jury apparently found, that the inconsistency was due to the fact that petitioner had fabricated his entire defense; until his cross-examination there was no suggestion in the proof that he had received money after November 1, 1937, and, therefore, he had prepared his defense to cover only the money received prior to that time.

The four errors now urged by petitioner grew out of a single sequence in this cross-examination. Petitioner discusses them as broad generalizations of law. We believe, however, that none of them can be separated from the cross-examination itself. The questions asked went to the heart of the proof, and petitioner's refusal to answer some of them by claiming privilege gave rise to a legitimate inference that he was unwilling to answer because the answers would show that his previous testimony and his defense were false. Likewise, the nature of those questions and the sequence of events lead-

ing up to the objection that interrupted his cross-examination at the critical point, made it appropriate to hear argument in his absence—the jury also being excused—and to deny him knowledge of what occurred so as to preserve the effectiveness of cross-examination; petitioner and his attorneys themselves evidently considered the procedure fair and proper at the time, for they acquiesced in it.

We shall not, therefore, discuss the four errors in the order in which petitioner presents them. Believing the logic of the facts to be critical, we discuss in Point I the facts concerning the cross-examination and show that there was no error in permitting the questions asked concerning petitioner's receipt of numbers money and accounting practices in 1938.

In Point II, we show that the nature of the cross-examination made it entirely fair and proper to require that he be absent from the argument; in Point II we also show that he was not denied the assistance of counsel by this procedure.

In Point III, we argue that the charge was proper on the inference to be drawn from petitioner's refusal to answer pertinent questions.

Finally, in Point IV we urge that even if error occurred in the procedure or in the charge, petitioner may not secure a second trial by questioning a fair and reasonable procedure in which he acquiesced at the trial, or by complaining of error in an instruction which he knew that the court intended to give and which he permitted to

be given without prior protest or subsequent exception that might have led to correction of any error.

I

THE COURT DID NOT ERR IN PERMITTING CROSS-EXAMINATION OF PETITIONER CONCERNING HIS RECEIPT OF MONEY FROM THE NUMBERS SYNDICATE IN 1938, AND HIS ACCOUNTING PRACTICES IN THAT YEAR

Before the petitioner took the stand as a witness in his own defense, it was established that the numbers syndicate made weekly payments of $1200 for protection against interference by the local authorities during part of 1935 and throughout 1936, 1937 and 1938 (R. 31–34, 59, Tr. 822–823, 973–975). Prior to November 1, 1937, Weloff and Towhey acted as agents for the syndicate in delivering the payments; they testified that the money was paid by them to petitioner (R. 43–47, 84–87). After November 1, 1937, Southern acted for the syndicate in delivering the payments; he testified, as a witness called by the court, that he had made the weekly payments not to petitioner but to Ferretti, a police inspector (R. 63). Since Ferretti was dead, it was not possible to inquire of him whether this was so and, if so, whether he paid the money to petitioner. The theory of the prosecution was that petitioner received *all* the weekly payments but had not reported them in his tax returns for 1935, 1936 and 1937 in order to evade the income tax; he was not indicted for 1938.

Petitioner's testimony on direct examination followed too precisely the prior proof. He admitted receiving the weekly payments of $1,200 from Weloff and Towhey, who had testified that they delivered the payments to petitioner until November 1, 1937 (R. 97, 105). He kept silent as to November and December 1937, although those months were in question; Southern had denied making the payments to petitioner during those months. Petitioner explained that he did not return the full amount of numbers money because he expended much of it for political purposes and because he believed that he owed a tax only on the amount which he retained (R. 109). His accounting practice, he said, was as follows: he recorded the balance of the weekly numbers payments on a slip of paper from a memorandum pad after subtracting any offsetting political expenditures; the slips were sent to his secretary for safekeeping; they were tallied in making up his income tax returns and then destroyed; and, finally, the total was entered in his returns under the heading "Commissions" (R. 106–107, 120–127).

This testimony left one obvious gap. Petitioner did not pretend in his direct examination that the amount reported in his 1937 return included any money received from the numbers syndicate in November or December of that year. Hence, proof that petitioner had continued to receive weekly payments during those months would establish his

guilt. Moreover, the implication of his testimony on direct examination was that he received none of the weekly payments of $1,200 made by the syndicate after November 1, 1937, because about that date Southern had succeeded Weloff and Towhey as "pay-off man." If it were shown that petitioner had received payments after that date, his credibility in the eyes of the jury would be damaged or destroyed.

Petitioner had said, moreover, that the item "Commissions" in his 1935, 1936, and 1937 returns was the balance of the weekly numbers payments remaining after deducting political expenditures. His 1938 return (the prosecutor knew) contained a similar item—"Other Commissions" (cf. R. 142). If petitioner had followed the same system in making his 1938 return as in the earlier years, he must have continued to receive the numbers payments in 1938. And if he received the regular weekly payments of $1,200 from the syndicate in 1938 after Southern had begun to deliver the money instead of Weloff and Towhey, just as he had received the same weekly payments in 1937 prior to November, was it not certain that he had received them in November and December also, and had attempted to deceive the jury by concealing that fact? The syndicate undoubtedly had made the weekly payments of $1,200 to someone during those two months. Clearly, therefore, it was logical to inquire along these lines. Since a con-

tinuous practice was involved, the answers would be material in any event in developing the credibility of petitioner's testimony concerning his extraordinary practice of recording on slips for income tax purposes the amount left over after political expenditures. And, if the defense were false, the entire structure would collapse. But the line of inquiry could not be expected to develop the truth from a witness who was untruthful and had learned from argument what questions would be asked and where they were directed.

The cross-examination to which petitioner objects pursued this line. After inquiry into petitioner's method of recording the numbers payments, the prosecutor asked how long petitioner kept up the practice and, after objection, brought out that petitioner followed the same course in 1938 as in the previous years (R. 126). The prosecutor then inquired, "Did you record $1,200 weekly each week in 1937?" The question was obviously fraught with most serious import. Petitioner's counsel precluded the effectiveness of the question. Apparently fearing the witness' answer, *counsel answered*. He said, "Until November 1st." He was reprimanded by the court (R. 129), but the witness had been given the answer. Further questions regarding November and December 1937 brought objections also helpful to petitioner as a witness and caused the court to rule (R. 129):

> You may have that exception and an exception to any question of a similar nature thereafter, but I do not think it is fair to raise it as a means of intimating to the witness—

In response to the questions, petitioner said that he recorded $1,200 weekly so long as Weloff received the money from the syndicate (R. 129). But he categorically denied receiving weekly payments in November or December from Southern who had become the syndicate's agent to make protection payments when Weloff stopped (R. 128–129).

The truth of petitioner's testimony on that issue then became the direct subject of attack along the lines explained above. Petitioner had said that he followed the same accounting system through 1938. He repeated that it was only the balance of the weekly payments from the numbers syndicate that had been recorded on memoranda slips and only the total of those slips that was represented by the item "Commissions" in his returns (R. 130). The next inquiry was "Did you receive any money from numbers in 1938?"; and petitioner, over objection, answered "Yes" (R. 130–131). The inference that petitioner had testified falsely concerning November and December was strong from that answer alone. There was no reason to suppose that the same syndicate which made regular weekly payments of $1,200 from 1935

until 1939, interrupted its continuous course of business for those two months to pay them to a different man than received them at all other times. The admission that payments were made in 1938 also went far to negate the petitioner's argument that such a change occurred on November 1, because on that date Southern commenced delivering the payments instead of Weloff and Towhey. But if it could be established that it was Southern who delivered the payments to petitioner in 1938, then even that loophole would be closed tight and the proof would be complete.

The critical question therefore was asked, "Who gave it to you?" (R. 131). Petitioner's counsel objected and asked for an opportunity to argue the point out of the presence of the jury. Argument was had, from which petitioner was absent. The court ruled that the questions were proper cross-examination but that petitioner could claim his privilege against self-incrimination if he wished, and suggested that his attorneys should advise him of his rights (R. 139).

Thereafter, the trial was resumed and the question, who paid petitioner the numbers money in 1938, was repeated. Petitioner's attorney, after a conference at the bench, then advised petitioner in open court that he had the right to refuse to answer questions which would tend to incriminate him of an offense for which he was not on trial. Although the question was relevant and material, petitioner

claimed privilege and was permitted to refuse to answer. (R. 140).

The following questions in the challenged line of cross-examination probed deeper into the inconsistency in petitioner's case. Petitioner repeated his assertion that he received numbers money in 1937 only until November 1st (R. 140). His income tax return for 1938 was then identified and attention was called to the item "Other Commissions" (R. 142–143). According to his previous testimony, this item could have reflected only the weekly numbers payments for he had sworn that this was true of his 1937 return and that in making up the 1938 return he had followed the same policy. The question was asked directly, what money was represented by the item in 1938, and the witness declined to answer on the grounds that he did not have his records present and that the answer would tend to incriminate him. The claim was sustained on the second ground (R. 143).

The logic and sequence of the trial, it is submitted, put beyond question the relevance and materiality of the cross-examination described above. The dissenting opinion below (R. 234–235) and petitioner's argument here (Br. 23–25) rest upon a misconception. There was no attempt to "impeach" petitioner's credibility by proving him guilty of another crime, or to lay a foundation for "impeachment" by calling witnesses to refute the answers. The inquiries were directed to issues on

trial, whether petitioner had in truth followed a "bookkeeping system" in recording numbers receipts and political expenditures, and, more particularly, whether he received unreported income in November and December 1937 which he had not included in his return and which at the trial he had attempted to conceal.

The cross-examination for those purposes was not rendered objectionable by the possibility that it would also impute to petitioner the commission of another crime. *Moore* v. *United States*, 150 U. S. 57; *Mehan* v. *United States*, 112 F. (2d) 561 (C. C. A. 8); *Cravens* v. *United States*, 62 F. (2d) 261 (C. C. A. 8), certiorari denied, 289 U. S. 733; *Weiss* v. *United States*, 122 F. (2d) 675 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Shettel* v. *United States*, 113 F. (2d) 34 (App. D. C.); *Detoe* v. *United States*, 103 F. (2d) 584 (C. C. A. 8). See also authorities cited p. 42, *infra*. Furthermore, any prejudice from the imputation that he had committed other crimes was prevented by careful instructions to the jury to have no regard to the fact that petitioner's income was received from illegal enterprises, and to decide the case solely upon the issue whether petitioner sought to evade the tax on income received in 1935, 1936, and 1937 (R. 173-174, 187). Clearly, the cross-examination is not ground for reversal.

We turn, therefore, to the questions whether the procedure followed during the cross-examination or the charge which grew out of it requires that pe-

titioner be granted a second trial. We show, first, that no error occurred and, second, that if error did occur it is not ground for reversal.

II

PETITIONER WAS NOT ENTITLED TO HEAR THE ARGUMENT TO THE COURT UPON THE PROPRIETY OF THE QUESTIONS BEING ASKED HIM ON CROSS-EXAMINATION AND WAS NOT DENIED ANY RIGHT TO CONSULT WITH HIS ATTORNEYS CONCERNING WHAT OCCURRED

In the cross-examination of petitioner, the question, "Who gave you the numbers money in 1938?" was critical. Petitioner's admissions that he received payments weekly in 1935, throughout 1936, in 1937 until November, and then again in 1938, were damaging enough to his claim that in November and December of 1937 he received none, but the proof that petitioner had falsely testified would be overwhelming if Southern, the man who was delivering payments in November and December, were shown to have made payments to petitioner in 1938. (See pp. 19–24, *supra*.) Consequently, when counsel for petitioner objected to the question, the following colloquy occurred (R. 131):

> Mr. WINNE. I object to that, if your Honor please. I think perhaps we should have argument upon this question . . .
>
> The COURT. We will argue the point. Mr. Burns, you may argue it.
>
> Mr. BURNS. In the first place . . .

Mr. WINNE. Don't you think we should argue it out of the presence of the jury?

The COURT. Very well, I will excuse the jury. The jury may take a recess.

(The jury withdrew.)

Mr. BURNS. If the Court please, as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the argument, and that when he resumes the stand he should do so without having an opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.

The COURT. I think that is a fair request. You may retire, Mr. Johnson.

(The defendant withdrew.)

The reasonableness of the request is plain. In order to rule on counsel's objection the court desired light on the relevance and competence of the line of inquiry. He could have retired to study the matter; he could have called counsel to the bench or invited them to his chambers, recessing the trial. Petitioner had no right to have the question argued at all, but since it was to be argued, it was appropriate to regulate the procedure so as to be fair to both the petitioner and the public. Argument upon the relevance and competence of the inquiry would call upon the prosecutor to disclose what questions he would ask, their purpose and the effect of the answers. Counsel for petitioner accordingly

desired the jury to be absent. At his request the jury was excused. For petitioner, then on the stand, to hear this argument would have been grossly inconsistent with the historic purpose of cross-examination. It would have enabled him to meet what he would have been openly advised by the prosecutor was the attack. Moreover, there was already reason to believe that his testimony on direct examination and his answers on cross were fabricated to meet the occasion, and his attorney had already intervened to coach him in such a way as to preserve the fabrication. (See p. 22, *supra*.)

On the other hand, there was no reason for the defendant's presence. When he withdrew the only question before the court was whether it was proper to ask him, who paid the numbers money which he received in 1938. There was no reason for the court to suppose that petitioner could assist his attorneys to argue the point or that the defense would be impeded by his absence. There is no claim, even after the event, that petitioner suffered any prejudice by his absence. The only injury suggested (Br. 14) is that "petitioner could have advised, made suggestions or even superseded his lawyer." The court was not bound to give weight to so theoretical a possibility.

A fair appraisal of the situation at the time, therefore, must have indicated to the court that, if argument by counsel was desirable, the argument

should be out of the presence of both the jury and the petitioner. It is plain, too, that petitioner and his attorney acquiesced in this appraisal. No objection was raised when the prosecutor made the suggestion or when the court approved it.

The ensuing argument, moreover, bears out this analysis and shows that nothing occurred calling for petitioner's presence. The prosecutor explained, much as we have done, the logic of his attack on the petitioner's credibility and emphasized that his questions related directly to the last two months of 1937, when, as in 1938, Southern was making protection payments on behalf of the numbers syndicate. Petitioner's attorney argued first that the questions went beyond the scope of direct examination. Then, he shifted his ground and argued that the questions were objectionable because they related to a possible crime committed in 1938, which was not covered by the indictment. At no time did petitioner's attorney suggest that he wished to consult petitioner or that he was hampered by petitioner's absence. (R. 132–139.)

The court ruled that the questions were proper cross-examination but that petitioner could claim his privilege against self-incrimination if he wished, and suggested that his attorneys should advise him of his rights (R. 139). When the trial was resumed, petitioner's attorney, after a conference at the bench, advised petitioner in open court that he had the right to refuse to answer

questions which would tend to incriminate him of an offense for which he was not on trial. At no time was the court requested to permit petitioner and his attorneys to confer upon the advisability of claiming the privilege. (R. 140.)

Notwithstanding his acquiescence at the trial, petitioner now challenges the above procedure upon two grounds; he contends (a) that he was denied his constitutional right to be present at the trial, and (b) that he was deprived of the effective assistance of counsel. The argument does not question the fairness of the procedure and the want of prejudice. Rather, it is said that the Court will presume injury if a constitutional right was denied. This begs the whole question, because the fairness and propriety of what occurred is decisive of the constitutional issue. The right of presence is not so absolute—at least when the jury is out—that there may not be circumstances, as in the instant case, permitting argument of law in the defendant's absence. Likewise, petitioner's right to consult with counsel in order to render his assistance effective, even if he had requested the opportunity, would not have included the right to interrupt the cross-examination for consultation to suit his convenience as a witness. To hold otherwise would, it is submitted, convert rights intended to secure a fair trial into mechanical formulae for evading the normal purpose of cross-examination.

A. THE RIGHT TO PRESENCE

The right of a defendant to be present at his trial is not found in any express constitutional provision similar to the guarantees of jury trial, assistance of counsel, and confrontation of the witnesses. The right of presence derives from the right to a fair trial according to due process of law. Presence is ordinarily so intimately related to an opportunity to defend that it has often been said to be a general rule that (*Schwab* v. *Berggren*, 143 U. S. 442, 448)—

> The personal presence of the accused, from the beginning to the end of a trial for felony * * * may be, and must be assumed to be, vital to the proper conduct of his defence, and cannot be dispensed with.[1] * * *

But the general rule does not obscure the basic principle. Although it is not ordinarily required, there may be occasions when the presence of the defendant at the argument of a preliminary motion, or even at the hearing on appeal, would be essential to due process even though the "trial" is over, or has not begun. Conversely, the general rule is not to be so mechanically applied as to require the presence of the defendant at all times and under all circumstances from the moment the jury is impanelled until the verdict has been returned. Since the aim is to secure fairness, the

[1] Similar generalizations are quoted or cited in petitioner's brief, pp. 10–12.

question becomes, it is submitted—at least when points of law are being argued and the jury is absent—whether the possibility that the defendant's presence may legitimately aid his defense is outweighed by some danger that he will gain only an advantage denying the public its right to have the issue fairly tried.

The constitutional validity of this position is established by *Snyder* v. *Massachusetts*, 291 U. S. 97. There it was held that a state did not deny due process by permitting the jury to view the scene of the crime in the defendant's absence, even though counsel pointed out what they wished the jury to observe and the view was to be weighed as evidence. A majority of the Court concluded that Snyder's presence or absence during the view bore no "relation, reasonably substantial to the fullness of his opportunity to defend against the charge (pp. 105–106)." *A fortiori*, due process does not secure the absolute right to be present at every argument of questions of law.

Petitioner seeks to distinguish the *Snyder* case on the ground that the view was not thought to be part of the "trial" and argues that the argument of questions of law in the absence of the jury must be regarded as part of the trial (Br. 12–13).* But

* We can see no basis whatever for petitioner's argument that in the *Snyder* case the Court reserved decision expressly on the question here involved. The passage quoted (Br. 13) deals with the submission of evidence to the jury and points out that even then the right of presence may not be inflexible.

the opinion of Mr. Justice Cardozo makes it clear that the decision did not rest on formal grounds or verbal definitions (see especially, 291 U. S. at 114–115). Moreover, for reasons stated below it is clear that argument of questions of law are not part of the "trial," as that term is used in stating the general rule concerning the right of presence.

The accepted rule governing proceedings before the jury is impanelled and motions after verdict also gives point to the view that a defendant has no absolute right to be present at argument of questions of law even though the jury has withdrawn. It is settled that due process does not always require the defendant's presence during proceedings before or after trial. *Snyder* v. *Massachusetts*, 291 U. S. 97, 107, 129; *Dowdell* v. *United States*, 221 U. S. 325, 331–332; *Schwab* v. *Berggren*, 143 U. S. 442, 449; *United States* v. *Cox*, 47 F. (2d) 988 (C. C. A. 5); *Alexis* v. *United States*, 129 Fed. 60 (C. C. A. 5); *United States* v. *Mahoney*, 43 F. Supp. 943 (W. D. La.). No essentially different problems are involved when the legal points are raised and argued after the jury has been impanelled but before the verdict is returned. Plainly, the point of time is irrelevant. The judge's ruling may be as important in the one case as in the other. The defendant's ability to assist in the argument will vary with the question presented and not with the time at which it is raised.*

* We are aware of no federal cases dealing with the precise issue. A few state cases dealing with the point have held

The approach followed in the dissenting opinion in the *Snyder* case would likewise lead, if followed in the instant case, to the conclusion that this petitioner was not denied his constitutional rights. The dissenting opinion, like that of the majority, bases the right of presence on the requirement of fundamental fairness (291 U. S. 128, 130) but it appears to accept unqualifiedly the general statement that a defendant has the right to be present throughout the "trial." The critical inquiry was said to be whether the view was "a part of the process of submission of data to the triers of fact," was "to play its part with oral testimony and written evidence in striking the balance between the state and the prisoner," and so was part of the "trial". (291 U. S. at 134). The implication is plain that if the answer is negative, then the proceeding is not part of the "trial" and the defendant's presence is not inflexibly required.

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that the defendant's presence at argument to the trial court is required. All of these decisions have arisen, however, under express statutes requiring the defendant's presence during the trial. *Adams* v. *State*, 28 Fla. 511, 10 So. 106; *State* v. *Sutter*, 71 W. Va. 371, 76 S. E. 811; *Lee* v. *State*, 161 S. W. (2d) 290 (Tex.); *Brooks* v. *State*, 77 Tex. Cr. R. 517, 179 S. W. 447. But cf. *State* v. *Hall*, 53 Mont. 182, 173 Pac. 267; *Palmer* v. *Commonwealth*, 143 Va. 592, 130 S. E. 396; *Haycod* v. *Commonwealth*, 157 Va. 918, 162 S. E. 10, 601; *Zimmerman* v. *Commonwealth*, 167 Va. 578, 189 S. E. 144; *State* v. *Maxwell*, 131 Kan. 951, 102 P. (2d) 109. *Fuller* v. *State*, 96 Ga. 430, 23 S. E. 825, cited by petitioner will be found on closer examination to involve argument by counsel to the jury and not argument to the court on points of law.

Judged by this test, it is clear that the argument of law in the instant case was not part of the "trial." The judge might have ruled at once on the objection or have retired to review the stenographer's notes and investigate the applicable precedents. He might have called counsel to the bench or have invited them to his chambers. Objections are dealt with daily by such methods but it has never been suggested that they deny the defendant the constitutional right to be present at his "trial." Nothing different in essence occurred in the instant case. In effect, by this, as by similar procedures, the "trial" was recessed while the court advised itself on the law with the assistance of counsel.

Up to this point we have discussed the right of presence as it were exclusively one of constitutional law. In fact, the practice to be followed under the common law rules prevailing in the federal courts may well be stricter in a defendant's favor than the Constitution required. Cf. *Frank* v. *Mangum*, 237 U. S. 309, 341. For example, in the exercise of its power to fix the practice in criminal cases in the federal courts (cf. *Funk* v. *United States*, 290 U. S. 371) this Court might develop a rule that the defendant should be permitted to be present whenever no reason for excluding him appeared, even though his presence on any particular occasion while the jury was absent might have no apparent relation to his opportunity to defend against the charge. But *cf.*

American Law Institute, Proposed Code of Criminal Procedure § 289. But there is no reason here to deal in generalizations; the issue concerns only the procedure followed in this particular case and not a ruling that a defendant may always be excluded from argument upon questions of law. Cf. *Snyder* v. *Massachusetts*, *supra*, at p. 115. In the trial court the question was whether, in the case of a defendant who did not ask and had no apparent reason to be present, the possibility that he would be made easier in his defense outweighed the certainty that the effectiveness of critical cross-examination would be diminished. For him to be present would interfere with a traditional means of eliciting truth. For him to withdraw during the argument together with the jury would not differ intrinsically from the common practice of discussing objections in conferences at the bench out of the hearing of the jury, the witness and the defendant. There can be no doubt under these circumstances, it is submitted, that the action of the trial court was correct.

B. THE RIGHT TO COUNSEL

Petitioner asserts throughout his brief that he was denied the right to confer with counsel concerning whether to claim the privilege against self-incrimination (Br. 3–4, 6, 20, 22, 25–26). The assertions are plainly not consistent with the record. No request for an opportunity for consultation was made at any time. Nor is it fair to say that the

judge had already ruled that no conference concerning the privilege could be held, or that petitioner's attorneys were foreclosed from making such a request by the earlier comment (Br. 22). The suggestion that the privilege might be claimed was made for the first time during the argument on whether the cross-examination was within the scope of the direct (R. 135–136). This was after petitioner's withdrawal. Petitioner's attorney continued to argue that the question was objectionable regardless of the privilege of the witness, and did not ever ask to confer with petitioner concerning the privilege. The court itself suggested twice to petitioner's attorney that he might advise petitioner of his rights and, in open court, after an unreported conference between court and counsel at the bench, his attorney explained the privilege to petitioner. (R. 135–143). Certainly, the court performed its duties fully by twice suggesting to petitioner's attorney that he might advise petitioner "about his rights" and by allowing him to give the only advice which he expressed a desire to communicate.

There is also some suggestion that the court denied petitioner the constitutional right to the assistance of counsel by hearing the argument on the objection to the cross-examination in petitioner's absence and then resuming the trial without affording an opportunity for consultation concerning what had occurred. But surely the court

was not required to read the mind of petitioner or his attorneys and discover that they wished to confer. Indeed, no suggestion that the opportunity to confer had been denied was made until after the decision of the circuit court of appeals. While the trial court characterized as fair the prosecutor's suggestion that petitioner should resume the stand without learning what occurred in the argument, its only direction to petitioner was that he should leave the room (R. 132). A request for an opportunity to consult was necessary to bring the question before the court and, in the absence of such a request, there was nothing to deny.

But if it be assumed *arguendo* that the court in effect denied petitioner the right to have his attorneys relate to him, before he resumed the stand, what occurred in the argument during his absence, nevertheless the result must be the same. Where a defendant has, as here, the full assistance of counsel, a request to interrupt or postpone the trial for a conference presents a procedural question to "be decided by the trial judge in the light of facts then presented and conditions then existing" *Avery* v. *Alabama*, 308 U. S. 444, 446). The considerations which made it reasonable to ask that the court hear argument in petitioner's absence likewise made it reasonable for the prosecutor to suggest that petitioner, when under cross-examination, should not be informed by the attorneys of his disclosures of his intended line of inquiry—disclosures the sole purpose of which was to

aid the court in ruling on the propriety of the questions.

Cross-examination is an old and vital part of the administration of justice. It is potent in eliciting the truth. It may not be rendered ineffectual by interruptions for conference with counsel concerning the questions asked. Such a procedure would test the tactical skill of opposing counsel but not the truth. No impairment of a defendant's rights results from maintaining cross-examination in its historic and essential place in a trial. A defendant may discuss his defense with his attorneys at other times. The decision to submit to cross-examination is made when the defendant takes the stand in his own defense. He is not obliged to become a witness and to subject himself to rules governing ordinary witnesses. Cf. *Raffel* v. *United States*, 271 U. S. 494. When he decides to do so, he has no need of assistance of counsel in order to tell the truth, and certainly he is not entitled to opportunity then to consult as to the answers.

III

THE TRIAL COURT DID NOT ERR IN PERMITTING THE JURY TO CONSIDER, IN DETERMINING PETITIONER'S CREDIBILITY, HIS REFUSAL TO ANSWER RELEVANT QUESTIONS ON THE GROUND THAT THE ANSWERS WOULD TEND TO INCRIMINATE HIM

In his closing argument the prosecutor emphasized the inconsistencies developed by the cross-examination of petitioner (See pp. 19–26, *supra*).

He pointed out that petitioner admitted receiving the numbers money in 1937 until November, that he was also shown to have received numbers money in 1938, and that there was no explanation of petitioner's avowal that he received no payments in the intervening two months, although it was not denied that the numbers syndicate disbursed the regular weekly amounts for protection. It was incredible, the prosecutor argued, that petitioner spoke the truth when he denied receipt of payments in November and December, and he went on to contend that petitioner claimed the privilege against self-incrimination in order to withhold information from the jury which showed that his evidence was not to be believed (R. 167–168).

In the course of this argument, the prosecutor stated, as if quoting petitioner, that petitioner had admitted violating the income tax law in 1938 by claiming his privilege against self-incrimination (R. 167). When petitioner's attorneys subsequently objected to this argument, the court suggested that he would indicate to the jury, first, that petitioner had made no such admission as the prosecutor had seemed to quote, and second, that he would limit the jury's consideration of the claim of privilege to its bearing on petitioner's good faith and credibility. Petitioner neither indicated that this course was not satisfactory to him nor asked the court to do more (R. 171). Accordingly, the court gave the instruction of which complaint is

now made (R. 173) and also charged the jury not to consider evidence concerning 1938 except as it related to previous years (R. 174). Petitioner, although he called attention to other parts of the charge, did not take exception to this instruction (R. 195–199). The case then went to the jury. In the circuit court of appeals, he asserted for the first time that the instruction was error.

Petitioner concedes that if the sequence of cross-examination was proper, the claim of privilege should probably have been disallowed (Br. 27–28). Clearly, this is the rule. A defendant is not required to take the stand and no adverse inference may be drawn if he fails to do so. *Bruno* v. *United States*, 308 U. S. 287. When he elects to testify, however, the prosecutor may cross-examine "with the same latitude as would be exercised in the case of an ordinary witness, as to circumstances connecting him with the crime" (*Sawyer* v. *United States*, 202 U. S. 150, 165–166). *Powers* v. *United States*, 223 U. S. 303; *Raffel* v. *United States*, 271 U. S. 494. And if the inquiries are relevant to the charge, a defendant may not refuse to answer on the ground that the answers will also tend to prove him guilty of another crime. *State* v. *Wentworth*, 65 Me. 234; *Commonwealth* v. *Nichols*, 114 Mass. 285; *People* v. *Dupounce*, 133 Mich. 1; *State* v. *Klitzke*, 46 Minn. 343; *State* v. *Ober*, 52 N. H. 459; *State* v. *Bailey*, 27 N. M. 145; *State* v. *Griffin*, 201 N. C. 541; *State* v. *Kent*, 5 N. D. 516.

Petitioner contends, however, that it was a perversion of the privilege to allow him to claim it and then to allow the jury to draw an adverse inference from the claim (Br. 25–26). The argument, it is submitted, misconceives the inference which was permitted to be drawn. The questions concerning 1938 were not asked to impeach petitioner by proving him guilty of a collateral crime. They were asked and were admissible to show that petitioner had followed in 1938 (if he had followed at all) a "bookkeeping system" practiced by him in 1937 for recording weekly payments of numbers money; that he had received the same weekly payments in 1938 which he had admitted to receiving in the first ten months of 1937 and that therefore (it would be argued) he must have received payments in November and December 1937 which he had not reported and about which in his previous testimony he had not told the truth. (See pp. 19–24, *supra*.) The inference which the prosecutor urged, and which the trial court permitted to be drawn, was not that petitioner claimed the privilege against self-incrimination and therefore could not be believed, because he admitted another crime. The inference argued to the jury was that petitioner would have answered the questions concerning 1938 if the answers would have helped his case and that he must have withheld the information because, if given, it would show that he received the weekly numbers payments regularly after Southern became "pay-off man"

and therefore must have received them in November and December (R. 167–168, 173–174).

Likewise, it is incorrect to suggest that the court misled petitioner by allowing him to claim the privilege. The ruling gave neither petitioner nor his attorneys any reason to suppose that no adverse inference would be drawn from his refusal to give pertinent testimony. As a matter of law, it does not follow from allowance of a claim of privilege that the prosecutor may not comment upon the fact that the defendant, who has taken the stand, is unwilling to make his evidence complete. Eminent authorities have urged that the sound practice is to permit both the claim and the comment on the silence, just as was done in the instant case. Cooley, *Constitutional Limitations* (3d ed.) p. 317. And as a matter of fact, petitioner, if he weighed his decision at all, must have taken into account the probability that the jury, whatever the comment by prosecutor or judge, would draw an adverse inference from the claim.

Undoubtedly, his silence would have been a proper subject of comment if petitioner had simply failed to explain the apparent inconsistency between his avowals that he received no numbers money in November and December (although admitedly payments were made) and his apparent receipt of the weekly payments before and after that time. In *Caminetti* v. *United States*, 242 U. S. 470, the Court held, p. 494:

> * * * where the accused takes the stand in his own behalf and voluntarily testifies for himself * * * he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

Accord: *Raffel* v. *United States*, 271 U. S. 494, 497; *Reagan* v. *United States*, 157 U. S. 301, 304–311; *Krotkiewicz* v. *United States*, 19 F. (2d) 421 (C. C. A. 6). The rule would apply *a fortiori* where the defendant, without explanation refused to answer inquiries concerning such facts.

Petitioner suggests no reason why a different rule should govern when the refusal to answer relevant and material inquiries is based upon his claim that the answers would be incriminating with respect to another crime, evidence of which would be admissible (see p. 26, *supra*). Plainly, none of the considerations which have led to prohibition of comment upon a defendant's failure to take the stand* are applicable here, and the cases cited by petitioner (Br. 26–27) therefore are not in point. We can conceive no policy requiring such a qualification of the rule that accused waives his privilege completely by becoming a witness in his own behalf. On taking the stand, he voluntarily assumes the

* See VIII Wigmore, *Evidence* (3d ed.), §§ 2272, 2272a.

burden of a full explanation of matters material to the charge, with the consequence that an adverse inference will be drawn from any failure to explain. He knows that he will be asked questions about apparently relevant facts even though they may tend to incriminate him of another crime. Any adverse inference from a later claim of privilege, therefore, is a foreseeable consequence of the original choice and is avoidable by electing not to testify. Cf. Wigmore, *op. cit. supra*, § 2276 (2d). "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness." *Raffel* v. *United States*, 271 U. S. 494, 499. The defendant has ample protection against irrelevant questions which tend to incriminate him of another crime in the right to object and have the evidence excluded on that ground.

The authorities accord with our position. In *State* v. *Ober*, 52 N. H. 459, an identical charge to the jury was held proper under almost precisely parallel facts. In that case comment by prosecution and by the court followed a claim of privilege against cross-examination concerning times outside the scope of the prosecution's direct evidence but within the scope of the general charge. The decision was approved in *Fitzpatrick* v. *United*

States, 178 U. S. 304, 315–316. And in VIII Wigmore, *Evidence* (3d ed.), § 2273 (4), it is said

> Furthermore, where the party refuses answer and claims privilege as to the matter which is in truth included in the waiver, but the answer is *not insisted upon*, the inference is of course available. * * *

The decision upon which petitioner relies (Br. 27) is inapplicable since it involved an ordinary witness having no privilege to refuse to take the stand in the first instance.

IV

THE JUDGMENT OF CONVICTION SHOULD BE AFFIRMED REGARDLESS OF WHETHER THERE WAS ERROR IN HEARING ARGUMENT IN THE PETITIONER'S ABSENCE DURING CROSS-EXAMINATION OR IN PERMITTING THE JURY TO CONSIDER PETITIONER'S CLAIM OF PRIVILEGE AGAINST SELF-INCRIMINATION IN TESTING HIS CREDIBILITY

It is familiar law that questions not raised in the trial court may not be assigned as grounds for reversal on appeal. The rule is based upon considerations of fairness to the courts and the parties and upon the desirability of ending controversies in the trial courts so far as possible by requiring that all issues be presented to them in the first instance. *United States* v. *Atkinson*, 297 U. S. 157, 159. Exceptions to the general rule have been recognized where the error could not have been avoided and the conviction obtained,' or where the error was substantially pointed out although no

precise exception was saved.[7] Also, the Court is reluctant to find a waiver of constitutional rights and will not hold that a defendant who had no counsel and cannot be presumed to have known his rights, waived procedural guarantees of the Bill of Rights merely by failure to assert them.[8] But we are aware of no instance in which the Court has awarded a new trial to a defendant who was represented by counsel, even for an alleged deprivation of his constitutional rights, where timely objection might have avoided the error and no unfairness occurred. For in such a case the general rule is further enforced by consideration of the disrespect for criminal procedure, and even for fundamental constitutional rights, which would result from permitting a defendant to obtain one verdict by acquiescing in avoidable error and then pointing to the error to secure a new trial after the first verdict went against him. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239. We submit that the instant case is governed by the general rule.

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[7] *Wiborg* v. *United States*, 163 U. S. 632, 658 (failure to move for directed verdict); *Clyatt* v. *United States*, 197 U. S. 207, 221–222 (failure to move for directed verdict); *Weems* v. *United States*, 217 U. S. 349, 362 (statute unconstitutional because minimum punishment cruel and unusual); *Brasfield* v. *United States*, 272 U. S. 448 (inquiry as to division of jury).

[8] *Crawford* v. *United States*, 212 U. S. 183, 194; *Burns* v. *United States*, 274 U. S. 328, 340–341 (dissenting opinion).

[9] *Johnson* v. *Zerbst*, 304 U. S. 458, 465.

A. THE RIGHT TO PRESENCE AND TO ASSISTANCE OF COUNSEL

Despite earlier *dicta*,[10] it is settled that the right of presence may be waived, either expressly or by a failure to assert it at the appropriate time. *Diaz* v. *United States*, 223 U. S. 442, 453–459; cf. *Frank* v. *Mangum*, 237 U. S. 309, 338–343; *Gaines* v. *Washington*, 277 U. S. 81; *Snyder* v. *Massachusetts*, 291 U. S. 97, 106, 134–135. The assistance of counsel may also be waived by a defendant conscious of the right. *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465. *A fortiori* a defendant who has counsel may forego his right to assistance so far as it turns upon consultation by his own and his attorney's failure to ask for the opportunity to consult.

Petitioner's conduct during the trial makes plain that he acquiesced in the procedure suggested by the trial court and waived whatever right he may have had to protest. Argument on the propriety of cross-examination while he and the jury were absent was not different intrinsically from the daily practice of arguing questions at the bench out of the hearing of the jury and the defendant. Moreover, in the circumstances here, that course was necessary to preserve the effectiveness of the cross-examination (see pp. 27–30 *supra*). Petitioner was represented by attorneys who vigorously defended the case. They would have pro-

[10] E. g., *Hopt* v. *Utah*, 110 U. S. 574, 578.

tested promptly if they had sensed unfairness or disadvantage in the suggestion that the petitioner withdraw during the argument and return without consulting his attorneys to learn what occurred. Their acquiescence in what occurred shows plainly that they wished to raise no question about it.

Petitioner now relies chiefly upon *Johnson* v. *Zerbst*, 304 U. S. 458, and *Glasser* v. *United States*, 315 U. S. 60, to show that his acquiescence in the procedure at the trial does not bind him on appeal. The *Johnson* case is not in point. The Court there held that no waiver occurred because the trial court had not advised a defendant who had no attorney that counsel would be appointed to represent him if he so desired: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, *in which the accused • • • is without counsel*" (p. 465). [Italics supplied.]

Likewise, the *Glasser* case is not contrary to our position. In that case the majority concluded that the trial court had impaired Glasser's rights by pressing the suggestion that Glasser's attorney should also represent a co-defendant with conflicting interests, after Glasser had once voiced his opposition to the plan. In the instant case neither petitioner nor his counsel ever expressed a desire that petitioner hear the argument of law. And it seems somewhat unrealistic to suppose, as petitioner would have the Court do (Br. 22), that he

was compelled to submit to the "order" [14] because protest would be futile. The so-called "order" was only the comment in answer to the prosecutor's unopposed suggestion, "I think that is a fair request. You may retire Mr. Johnson" (R. 132)."

We need not rely, however, on the waiver alone. There may be a duty resting upon a trial judge to inquire into "unreasonable or undue departures" from normal trial procedure even though the defendant is represented by counsel attentive to his rights. Cf. *Patton* v. *United States*, 281 U. S. 276, 312–313; *Glasser* v. *United States*, *supra*, at p. 50. No such question is presented here. The procedure was a sound way to maintain the effectiveness of cross-examination. It does not differ from the customary conference between court and counsel at the bench. It created no risk of prejudice to petitioner. It is not suggested that he was able to add to the argument of the question mooted in his absence, and we perceive no way in which he might have later been easier in his defense if he had been present, except by learning what questions would be asked him—an advantage to which he was not entitled when actually under cross-examination.

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[14] Br. 18.

[15] There is a second distinction between the *Glasser* case and the instant case. In the *Glasser* case the question was whether Glasser had the effective assistance of counsel at all in his trial or whether he was deprived of it by the appointment of his attorney to represent a co-defendant with conflicting interests. No such question is involved here where the point is whether the absence of consultation at a particular moment in the trial vitiates the trial.

It is submitted therefore that petitioner may not now attack the procedure in which he acquiesced. If he had objected, the error, if any, might never have occurred. The trial, including the procedure challenged, was in all respects fair and the proof of guilt overwhelming. Even were it true that he had a legal right to a different procedure, if he had asserted it, he should not now secure a second trial by its belated assertion after accepting the risk of what the verdict would be without its assertion.

B. THE CHARGE

It is clear, we submit, that the above principle also forecloses petitioner's contention that there was reversible error in the instruction given to the jury that, in determining petitioner's credibility, it might weigh his claim of privilege not to answer relevant questions on cross-examination on the ground that the answers would tend to incriminate him. The instruction was given after previous warning to counsel in order to cure any harm done by an improper statement in the prosecutor's closing argument (see pp. 40–42 *supra*). Petitioner had made no prior requests for a charge on this subject which were refused. At the conclusion of the charge his attorney took exceptions on several points and the court gave additional instructions in response to certain of the objections raised. No objection was made or exception taken to the portion of the charge dealing with the inference from

the claim of privilege (R. 195–199). No error was asserted on this ground in the motion for a new trial, in the grounds of appeal, or in the assignments of error (R. 199–200, 205–214). The point was first raised in argument before the circuit court of appeals.

There is particular reason to invoke the general rule in the instant case. It is commonly believed that a jury may take into account and draw adverse inferences from any claim of the privilege against self-incrimination. The claim in the instant case must have implanted itself firmly in the jury's mind because it was made at one of the crises in the trial to escape a decisive question. At the trial petitioner's attorneys might well have concluded that the jury would not remove the incident from their minds even if the judge so charged them, but that the incident might be minimized by the instruction limiting any adverse inference to the matter of credibility.

Petitioner is therefore in the position of asserting error to an instruction which might have aided him, even though he objected to the closing statement exclusively on another ground, accepted the substance of the instruction suggested by the court, and then failed to object to it after it was delivered within a time which would have permitted the court to correct any possible error. Under the circumstances, he may not now complain. *United States* v. *Manton*, 107 F. (2d) 834, 846–848 (C. C.

A. 2), certiorari denied, 309 U. S. 664; *Boyd* v. *United States*, 271 U. S. 104; *Wong Tai* v. *United States*, 273 U. S. 77, 83; *United States* v. *Buckner*, 108 F. (2d) 921, 928 (C. C. A. 2), certiorari denied, 309 U. S. 669.

CONCLUSION

It is respectfully submitted that the trial was fair, that the conviction was proper and that accordingly the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1942,

No. 273

ENOCH L. JOHNSON,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1942, No. 273

Enoch L. Johnson,
Petitioner
vs.
United States of America

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Enoch L. Johnson, by his attorney William A. Gray, petitions the Court for a rehearing of the appeal in the above-entitled case upon the following grounds:

1. The Court refused to grant a new trial because of "one circumstance" which seemed controlling and that circumstance was based, at least in part, on a misunderstanding of the facts of the case.

2. The decision of the Court holds that the trial judge violated principles of "elementary fairness", but holds further that petitioner had "expressly waived" his rights, which holding is based primarily on a plain misreading of what transpired at the trial; and it is not clear whether the decision would be the same on a correct analysis of the facts.

3. The cases cited in support of the decision of the

Court (*Boyd v. United States*, 271 U. S. 104 and *United States v. Manton*, 107 F. 2d 834) should not be applied to a case in which the trial judge and all counsel involved were not conscious of any error committed, especially where the specific problem had never been raised nor decided in a federal court.

POINTS 1 AND 2

The Opinion of the Court (p. 8)* contains the following:

"We have considered this matter at length because the Circuit Court of Appeals ruled upon it and approved the procedure followed by the District Court. But we do not grant a new trial because of *one circumstance* which seems to us controlling. As we have noted, *though an exception was taken to the prosecutor's comment on petitioner's refusal to testify, it was later withdrawn.* And when the court invited counsel to bring to its attention any objections or requests to charge, *counsel did not renew the objection.* Nor was any request made to charge the jury on the matter. Moreover, though the question of the prosecutor's comment was again adverted to by the defense, the *objection was of a wholly different character* and one which the court indicated its willingness to correct. And when the court stated what charge it would give the jury on the point, counsel for the defense stood by and voiced no protest or objection. *We can only conclude that petitioner expressly waived any objection to the prosecutor's comment by withdrawing his exception to it and by acquiescing in the treatment of*

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* ... U. S. ..., 87 L. ed. 456, 462.

the matter by the court. * * * This is a case where silent approval of the course followed by the court * * * *is accompanied by an express waiver of a prior objection* to the method by which the claim of privilege was treated." (Italics supplied)

It is obvious from the above quote that the Court was of the opinion that the petitioner had *expressly* waived his right to complain because he had withdrawn an objection previously made on the very point in issue and had not renewed this objection.

We think it pertinent to point out that petitioner's right to a reversal depends entirely upon the fundamental error committed by the *trial judge* in his charge and not upon the error committed by the *prosecutor* in commenting upon the claim of privilege. This is obviously so in view of the fact that the trial judge sustained the objection to the prosecutor's comment and corrected *that* error in his charge.

At the outset we concede that the trial judge fairly indicated to counsel how he would charge the jury on the point, and that counsel acquiesced in this and took no exception. Our contention, however, is that this mere acquiescence should not have been held to constitute an *express* waiver of petitioner's fundamental rights, especially since the Court had already decided that the "requirements of fair trial" precluded any comment on the claim of privilege (Opinion,* pages 5-6).

The facts were these: After the closing speeches, Mr. Mehler, associate counsel for petitioner, made the following statement (Typewritten Transcript, pp. 1932-1933):

"Mr. Mehler: There were a great many remarks addressed to the failure of the defendant to answer

* U. S. , 87 L. ed. 466, 330.

questions relating to his income for the year 1938 when the witness or defendant had stated that he was standing on his privilege. One of the remarks made by the District Attorney to the jury was that I violated, supposedly quoting Johnson, the income tax law of 1938. I say there is no such testimony that the defendant violated the tax law.

The Court: He didn't say that. You misquoted him. He indicated that it might be fairly inferred from his claiming his privilege of immunity that he admitted violating the law in 1938. I think that may be fairly inferred.

Mr. Mehler: I have taken this as a quotation.

The Court: You are overruled on that.

Mr. Mehler: May I have an exception?

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

(Sealed)"

We desire to emphasize that this was the sole reference by Mr. Mehler to that portion of the prosecutor's address to the jury about which we have complained. The court then adjourned to the following morning (R. 169).

Mr. Winne, petitioner's chief counsel, stated at the morning session as follows (R. 170):

"Mr. Winne: I am now discussing Mr. Burns' comment on the fact that the defendant when on the stand pleaded his constitutional privilege. On page 1912 Mr. Burns makes this comment on the fact that the defendant had said before he pleaded his privilege that he did receive certain moneys in 1938. 'He said, "I claim my privilege against self-incrimination. I violated the income tax law in 1938; I don't want to tell you about that. I am having enough trouble with 1935, six and seven." If he could have claimed his

privilege on the stand here with respect to 1935, six and seven he would have done it. He would claim anything that is necessary to get him out of any predicament he is in.'

I say, of course, that when he quotes, 'I violated the income tax law in 1938', it is an entire misconception of what the claim of privilege is. The claim of privilege, of course, we all understand, is that the testimony if given would have a tendency to incriminate him. Not that it would prove him guilty, not that by claiming the privilege he admits his guilt, but that merely by claiming the privilege he desires to be relieved from giving any testimony which might have a tendency to incriminate him."

We respectfully submit that this was precisely the objection made by Mr. Mehler on the previous night, but this time the trial judge recognized that the prosecutor's comment was objectionable. He then, after the prosecutor had suggested the point, indicated that he would charge the jury that the claim of privilege could be considered only on the question of credibility (R. 171). It was thereafter that petitioner's counsel said (R. 172), "We withdraw whatever was said *last night*."

On this statement of the facts, can it accurately be said that an objection was made and withdrawn, and *not* renewed? Can it be said that when the prosecutor's comment was again adverted to by the defense, the objection was of a *wholly different* character? Do these facts show "an express waiver of a prior objection to the method by which the claim of privilege was treated"?

We respectfully suggest that not only was the identical objection renewed, but indeed the trial judge recognized his error of the previous night and indicated that he would

correct the matter in his charge—which he did in fact (R. 173-174).

Our problem, however, does not involve the *prosecutor's* comment or any objection thereto. We argued in our brief (pages 25-28) that the "perversion of the privilege against self-incrimination" was committed by the *trial judge* in his charge. We reiterate that we are concerned solely with *that* error and we again concede that no request was made for a proper instruction and no exception was taken to the improper one given. Therefore, the "waiver", if any was not express, but one which must be inferred from the silence of petitioner's counsel.

In such a case as this, where the charge of a trial judge has been held to be prejudicial error, we submit that this Court should correct the error even though the question was not properly saved. There is ample authority sustaining the right of an appellate court to do so,* and we know of no case in which the exercise of the right was declined after the Court had held, in effect, that the defendant was not afforded a fair trial.

POINT 3

We urge this Court to reconsider its decision that petitioner be held to strict rules of procedure in a case which settles a new rule of law for the first time in a federal court.

Neither the trial judge, the prosecutor, nor defense counsel had any reason to believe the charge was erroneous. Indeed, the prosecutor, in defense of his comment said (R. 171):

* See, for example, *Miller v. United States*, 120 F. 2d 968, 972; *Rose v. United States*, 128 F. 2d 622, 626 and cases therein cited.

"Mr. Burns: It is a question of his good faith and his credibility, and the answers he has already given on similar questions. That is the purpose for which the questions were permitted."

And the trial judge thereupon said (R. 171):

"The Court: I think I probably should indicate to the jury that that is the full extent of it."

We agree that petitioner's counsel raised no objection. He merely acceded, and logically so, in the statement of both the judge and prosecutor—a statement which was erroneous, as we now know, *only* because this Court has so ruled for the *first* time—and, indeed, it is the *first* ruling on the point in any federal court.

Are we to impute to a defendant on trial such responsibility as to prevent his receiving a new trial for a plain and prejudicial error merely because his counsel failed to make a technical objection? We respectfully submit that no defendant should be deprived of his rights because of the failure of those duty-bound to protect those rights to recognize that error had been committed.

We agree with the results in both the cases cited in the Court's opinion in this connection. There are innumerable cases so holding. But how can the petitioner herein be said to be in the position of the defendant in the *Manton* case? Can his counsel be said to have "consciously and intentionally" failed to object when there was no guide for him to determine that error had been committed?

Likewise, in the *Manton* case, the trial judge, in substance, properly charged the jury on the effect of character testimony. That is, unlike here, the court there did not hold that the charge was clearly erroneous and prejudicial.

The same may be said for the *Boyd* case. There, an

isolated portion of the charge was claimed, on appeal, to have been ambiguous. This Court very properly held that when considered with the charge as a whole, the language was understandable. There was found no real error or prejudice.

And, further, in the *Boyd* case, the court said (p. 108):

> "* * * Besides, in view of what was said in other parts of the charge, we are justified in assuming that had the court's attention been particularly drawn at the time to the part complained of now, it would have been put in better form."

We respectfully submit that this entire record is consistent only with the thought that the trial judge firmly believed that it was proper to consider petitioner's claim of privilege as testing his credibility. He had overruled the objections to the questions asked on the ground that they were relevant to test credibility (See, for example, R. 136, 138, 139). He had indicated how he would instruct the jury (R. 171).

We think it fair to say that the charge as given would have been unchanged, and that the most counsel could have accomplished would have been to have the mere word "Exception" on the Record.

We deem it necessary, in concluding, to answer the contention that this point was a "mere afterthought". The Court, in its opinion,* said (page 9):

> "The fact that the objection did not appear in the motion for a new trial or in the assignments of error makes clear that the point *now* is a 'mere afterthought'. United States v. Manton, supra, p. 847."

We agree that the objection to the judge's charge was

---

* U. S. , 87 L. ed. 496, 503.

not *specifically*** raised in either the motion for a new trial or in the assignments of error. It is true that the *actual* point involved was not raised until petitioner's counsel in the Circuit Court made a careful analysis of the precise situation and recognized that prejudicial error had been committed. But thereafter the point was raised and argued in the Circuit Court and extensively discussed by both Judges Biggs and Jones in their respective opinions (R. 229-230, 231; 237-241). It was, of course, specifically urged in the brief and argument in this Court.

Certainly, petitioner was not guilty of the delay of the defendant in the *Manton* case, where the point was raised and given serious consideration for the first time in a *reply* brief. Cf. *Glasser v. United States*, 315 U. S. 60.

We respectfully submit that the failure of a defendant in a criminal case properly to object to a judge's charge which, for the first time in a federal court, has been held to be prejudicial error, should not constitute a waiver of his rights. This is not a case where "an accused *elected* to pursue one course at the trial and then, when that has proved to be unprofitable, [insisted] on appeal that the course which he *rejected* at the trial be *reopened* to him" (Opinion,* page 9). There was never any conscious or intelligent election in this case.

The language of the decision, thus, creates a doubt as to whether the finding of the Court was based on an *express* waiver, or whether the same result would follow on the facts as they really exist, showing at most mere acquiescence in the trial judge's charge.

** The point, as then understood by all involved, was raised inferentially in both the Motion for a New Trial and in the Assignments of Error. (See, for example, Reason 6 in Motion for a New Trial, R. 199; Assignments 10, 11, 13, R. 209-10, and the opinion of the trial judge overruling the Motion for a New Trial, R. 202.)

* U. S. , 87 L. ed. 496, 503.

For the above reasons, your petitioner respectfully prays that this Court grant a rehearing.

Respectfully submitted,

WILLIAM A. GRAY,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

WILLIAM A. GRAY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 273.—October Term, 1942.

Enoch L. Johnson, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 15, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was convicted of wilfully attempting to defeat and evade his federal income taxes for the years 1936 and 1937. He was acquitted for 1935. Petitioner was a political leader in Atlantic City and Atlantic County, New Jersey. The prosecution's theory was that he had received large sums of money from those conducting the numbers game for protection against police interference and had not reported those sums in his income tax returns for 1935, 1936, and 1937. The defense was that his failure to return all the income he had received resulted from the mistaken but sincere belief that he was bound to return only the net balance remaining after deducting amounts expended for political purposes. The evidence was that one Weloff and one Towhey acting alternately delivered to petitioner on behalf of the numbers syndicate $1,200 a week from July 1935 to November 1937. About November 1, 1937, Weloff and Towhey were displaced by one Jack Southern to whom the syndicate delivered $1,200 a week. Neither the prosecution nor the defense would sponsor Southern's testimony. At the request of the prosecution the court called Southern as a witness. He testified that during November and December, 1937, he delivered the $1,200 a week to an inspector of police named Ferretti who was dead at the time of the trial. He denied that he ever made any weekly payments to petitioner. No evidence was adduced that petitioner received any sums from the syndicate during November or December, 1937. Petitioner took the stand and on direct examination admitted that he had received the weekly payments from Weloff and Towhey up to November, 1937. For 1937 these admitted payments totalled

$50,400. Petitioner accounted for this sum by stating that he had reported $30,189.99 in his 1937 return as "Other commissions" and that he had paid out the balance, roughly $21,000, as political contributions for that year. On cross-examination he denied that he had received payments from Southern during November and December, 1937.[1] He was then asked "Did you receive any money from numbers in 1938?" Counsel for the defense objected to the question on the ground that it was not relevant to the issue and would tend to prove a different offense than the one charged in the indictment. The court overruled the objection. Petitioner then answered the question in the affirmative. He was then asked, "Who gave it to you?" Counsel for the defense objected. The court had the jury withdraw. The prosecutor asked that petitioner "also be excused from the court room during the argument, and that when he resumes the stand he should do so without having any opportunity to hear what the argument is about". The court said "that is a fair request" and ordered petitioner to retire, which he did. No objection was made to that action. Counsel for the prosecution argued that the questions asked in cross-examination were proper to establish a continuous practice of receiving the numbers income throughout 1937. Counsel for the defense insisted that the cross-examination should be limited to the subjects opened up by the examination in chief. The court expressed the view that the cross-examination was permissible since it bore directly upon credibility. Counsel for the defense then pressed the point that even if it otherwise might be proper cross-examination, nevertheless it was "improper cross-examination for the reason that it is directed to a future prosecution." He asserted that he made the claim of privilege on behalf of the accused "in view of the avowed threat of the government to prosecute him for the very years concerning which he is now asked to testify". The court replied that it was for the accused, not his counsel, to make the claim and added, "You may advise him of his rights, of course, but it is for him to determine whether or not he wishes to take advantage of them". After further argument, the court stated:

"It seems to me that the testimony is perfectly relevant and material as cross examination directed to credibility.

"In view of the witness' testimony, unless it runs afoul of his

[1] The indictment charged that the defendant had received $62,400 from the numbers game in 1937. It was the difference between that amount and $50,400 admittedly received which was in dispute.

right not to be required to incriminate himself, it seems to me that that is a right which he may waive or claim, and that that is a personal right that he may be advised by counsel when a question is asked, and that he will have to determine himself whether he is going to claim it or not."

Petitioner resumed the stand. The question "Who gave it to you?" was repeated. Counsel for petitioner then advised him of his constitutional privilege, which he thereupon claimed. The court ruled, "You may decline to answer."

The prosecutor in his address to the jury commented at some length on petitioner's assertion of his constitutional privilege:

> I asked him, "Did you get the money in 1938?" and he said, "Yes". Well, of course, then a lot of little things happened. They didn't like that because naturally you say, "Well, I don't understand that, Mr. Johnson." I wish you could have asked him questions then. You say, "Mr. Johnson, you say that suddenly November 1st, 1937 you stopped getting the $1200 from numbers; then in 1938 you started to get it again? How come?" You don't get it, you don't get it because it isn't the truth. That is what cross examination is for.
>
> So then we went beyond that. We said, "Who did you get it from?" He said, "I claim my privilege against self-incrimination. I violated the income tax law in 1938; I don't want to tell you about that. I am having enough trouble with 1935, six and seven." If he could have claimed his privilege on the stand here with respect to 1935, six and seven he would have done it. He would claim anything that is necessary to get him out of any predicament he is in. Well, now, ladies and gentlemen, if he got that numbers money in 1938 who did he get it from? He must have got it from Jack Southern. Maybe he got it from Inspector Ferretti, but he admits he got it. Well, then, if he got it he got it during the last two months of 1937. They didn't say anything about that to you because they were trapped. No need of them talking about it. It is for me to point that out to you.
>
> Now, ladies and gentlemen, can you believe that man told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from on the ground it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground it would incriminate him, well, then, I just don't get it.

An objection was made to these statements and overruled and an exception was noted. The next morning before the court charged

the jury various other objections were submitted. During the colloquy the court stated that there "were a number of matters referred to last evening . . . I ruled on some of them, all of which rulings I indicated I would reconsider. Now, have you mentioned to me now all the points you desire to refer to?" Counsel for petitioner replied, "We withdraw whatever was said last night . . . I think the only fair thing to do is to forget everything that happened last night and start this morning." The objection previously made to the prosecutor's comment on the accused's failure to testify was not renewed. Nor was any request made to the court to charge the jury to disregard petitioner's refusal to testify. Though the prosecutor's comment on the accused's failure to testify was again adverted to, it was in a different connection. Counsel for petitioner contended that the prosecutor's statement that the claim of privilege amounted to an admission of income tax violation in 1938 was "an entire misconception of . . . the claim of privilege" inasmuch as the basis of the claim "is that the testimony . . . would have a tendency to incriminate him", and "not that it would prove him guilty". The court indicated that this objection was well taken and should be called to the attention of the jury. The court added, "He is not being charged with any 1938 tax." The prosecutor then said, "It is a question of his good faith and his credibility, and the answers he has already given on similar questions. That is the purpose for which the questions were mitted." The court thereupon stated, "I think I probably shoul indicate to the jury that that is the full extent of it." C sel for petitioner remained silent, making no objection. No er was asserted in the motion for a new trial or in the assignments of error on the ground that the prosecutor's comment or the court's charge on the inference from the claim of privilege was improper.

The court in its charge stated that petitioner's refusal to answer the question on the ground that it would tend to incriminate him "may only be considered by you in testing his credibility as to the answers which he did give and his good faith in the matter" and that petitioner was not being tried for anything he did in 1938. To this charge no objection was made.

The Circuit Court of Appeals affirmed the judgment of conviction, one judge dissenting. 129 F. 2d 954. The court held that the exclusion of petitioner from the court room during the colloquy did not result in prejudice; that the cross-examination covering 1938 income was proper; and that the allowance of comment on the

claim of privilege was justified. The case is here on a petition for a writ of certiorari.

The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying (*Bruno* v. *United States*, 308 U. S. 287) are of course vastly different. *Raffel* v. *United States*, 271 U. S. 494. His "voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts*, because of the necessary connection between all." 8 Wigmore, Evidence (3d ed., 1940) § 2276 (2). And see *Fitzpatrick* v. *United States*, 178 U. S. 304, 315-316; *Powers* v. *United States*, 223 U. S. 303, 314. The cross-examination did not run afoul of the rule which prohibits inquiry into a collateral crime unconnected with the offense charged. *Boyd* v. *United States*, 142 U. S. 450. Inquiry into petitioner's income for 1938 was relevant to the issue in the case. As contended by the prosecution, the receipt of money from the numbers syndicate prior to November, 1937 and after December, 1937 might well support a finding of the jury that in view of all the circumstances the payments were not in fact interrupted during the last two months of 1937. The amount and source of the 1938 income accordingly were relevant to show the continuous nature of the transactions in question. That line of inquiry therefore satisfied the test of relevancy and was a proper part of cross-examination. See *Cravens* v. *United States*, 62 F. 2d 261, 273; *Mehan* v. *United States*, 112 F. 2d 561, 563; *Weiss* v. *United States*, 122 F. 2d 675, 682; *Bullock* v. *State*, 65 N. J. L. 557, 575. Though the issue might have been more aptly phrased by the court in terms other than credibility, the meaning of the ruling in its context is plain. Thus we may assume that it would not have been error for the court to deny petitioner's claim of privilege. In such a case his failure to explain the source of his numbers income in 1938 could properly be the subject of comment and inference. As stated by this Court in *Caminetti* v. *United States*, 242 U. S. 470, 494, an accused who takes the stand "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any com-

ment. That certainly is true where the claim of privilege could not properly be denied. The rule which obtains when the accused fails to take the stand (*Wilson* v. *United States*, 149 U. S. 60) is then applicable. As stated by the Supreme Court of Pennsylvania, "If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it." *Phelin* v. *Kenderdine*, 20 Pa. 354, 363; *Wireman* v. *Commonwealth*, 203 Ky. 62-63. And see *State* v. *Froman*, 45 S. D. 465, 473; *Carne* v. *Litchfield*, 2 Mich. 340; *People* v. *McGungill*, 41 Calif. 429. We also think that the same result should obtain in any case where the court grants the claim of privilege and then submits the matter to the jury, if that action may be said to affect materially the accused's choice of claiming or waiving the privilege and results in prejudice. The fact that the privilege is mistakenly granted is immaterial.

The ruling of the court gave the petitioner the choice between testifying and refusing to testify as to his 1938 income. An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. In this case it would lie between protection against an indictment for 1938 and the use of his claim of privilege as evidence that he did in fact receive the income during the last two months of 1937. Elementary fairness requires that an accused should not be misled on that score. If advised by the court that his claim of privilege though granted would be employed against him, he well might never claim it. If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed. Certainly the question whether petitioner had received income from the syndicate during November and December, 1937, was an extremely material issue in the case. As we have noted, petitioner admitted receiving $50,400 from the numbers syndicate during 1937. And all of this amount accord-

ing to the testimony was received prior to November 1, 1937. Of this amount he reported only $30,189.99 in his 1937 income tax return. He testified, however, that he had paid out $21,000 in political contributions for that year. Thus he attempted to account for all the numbers income which he had received that year and defended on the ground that his failure to return the $21,000 was due to his mistaken but sincere belief that he was bound to return only the net balance remaining after deducting amounts expended for political purposes. The indictment, however, charged that he had received $62,400 from the numbers syndicate during 1937. And the prosecution claimed that the weekly payments of $1200 continued during November and December, 1937. If that were established, it would plainly destroy his defense and would be cogent evidence of his wilful attempt to evade the tax. All of the direct evidence in the record was to the effect that he had not received income from the numbers syndicate during November and December, 1937. There was no basis for concluding that he had unless that fact was to be inferred from the evidence that he had received the income until November, 1937 and that he received it again in 1938. Hence it would be highly valuable to the prosecution and equally damaging to the accused to have his failure to testify employed to bolster such an inference.

It is no answer to say that comment on a defendant's refusal to testify does not in any way place him in jeopardy of being charged with or convicted of the crime protected by his privilege. That may be admitted. The problem here is a different one. It is whether a procedure will be approved which deprives an accused on facts such as these of an intelligent choice between claiming or waiving his privilege. Knowledge that a failure to testify though permitted by the court would be submitted to the jury might seriously affect that choice. If the accused makes the choice without that knowledge, he may well be misled on one of the most important decisions in his defense. We would of course not be concerned with the matter if it turned only on the quality of legal advice which he received. But the responsibility for misuse of the grant of the claim of privilege is the court's. It is the court to whom an accused properly and necessarily looks for protection in such a matter. When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of

oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers.

We are mindful of the fact that there is eminent authority which may be said to represent the contrary view. *State* v. *Ober*, 52 N. H. 459. That case stands for the general proposition that when the accused took the stand "without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience." *Id.*, p. 465. With that rule we agree. Whether the facts of that case and the stage of the proof when the privilege was claimed made the comment on the accused's failure to testify prejudicial, cannot be determined from the report of the case. The point with which we are here concerned was not adverted to in the opinion. Indeed the court stated (52 N. H. p. 465) that the "whole argument of his counsel now proceeds upon the erroneous assumption that the ruling of the court [granting the claim of privilege] was right. That assumption being groundless, his argument fails." But as we have indicated, the problem in this case is quite different.

We have considered this matter at length because the Circuit Court of Appeals ruled upon it and approved the procedure followed by the District Court. But we do not grant a new trial because of one circumstance which seems to us controlling. As we have noted, though an exception was taken to the prosecutor's comment on petitioner's refusal to testify, it was later withdrawn. And when the court invited counsel to bring to its attention any objections or requests to charge, counsel did not renew the objection. Nor was any request made to charge the jury on the matter. Moreover, though the question of the prosecutor's comment was again adverted to by the defense, the objection was of a wholly different character and one which the court indicated its willingness to correct. And when the court stated what charge it would give the jury on the point, counsel for the defense stood by and voiced no protest or objection. We can only conclude that petitioner expressly waived any objection to the prosecutor's comment by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court. It is true that we may of our own motion notice errors to which no exception has been taken if they would "seriously affect the fairness, integrity or public reputation of judicial proceedings." See *United States* v. *Atkinson*, 297 U. S. 157, 160; *Clyatt* v. *United States*, 197 U. S. 207,

221-222. But we are not dealing here with inadvertence or oversight. This is a case where silent approval of the course followed by the court (*Boyd* v. *United States*, 271 U. S. 104, 108) is accompanied by an express waiver of a prior objection to the method by which the claim of privilege was treated. In such a situation the rule stated by Mr. Justice Sutherland in *United States* v. *Manton*, 107 F. 2d 834, 848, is applicable:

"If the failure to enter an exception or assign error had been a mere inadvertence the matter might stand in a different light. But that view cannot be indulged. Plainly enough, counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied. We see no warrant for the exercise of our discretion to set aside standing rules, so necessary to the due and orderly administration of justice, and review the challenge to the legal accuracy of the charge where, as here, the failure of the judge to follow the text of the requested instruction was, at the last, induced by the action of counsel . . . ."

Any other course would not comport with the standards for the administration of criminal justice. We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the assignments of error makes clear that the point now is a "mere afterthought." *United States* v. *Manton*, *supra*, p. 847.

The remaining objections may be briefly disposed of. It is claimed that the expulsion of petitioner from the court room while counsel were arguing the question of the propriety of the cross-examination on his 1938 income deprived him of his right to be present during the trial. Cf. *Snyder* v. *Massachusetts*, 291 U. S. 97. It is also urged that petitioner was denied the advice of counsel in that the court directed that when he resumed the stand he do so without having an opportunity to confer with his counsel about claiming the privilege. But there is a simple answer to these objections. Not only were no exceptions taken to these

rulings; it also appears that they did not result in a loss of the privilege which the court had indicated it would recognize. For when petitioner resumed the stand, he was advised of his right to claim the privilege, he claimed it, and it was granted. Accordingly we cannot see where any prejudice resulted even if we assume, *arguendo*, that the rulings of the court were not correct.

Affirmed.

Mr. Justice MURPHY and Mr. Justice JACKSON did not participate in the consideration or disposition of this case.

Mr. Justice FRANKFURTER, concurring.

In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.

An examination of the entire record of the proceedings leaves me without doubt that Judge Maris conducted the trial with conspicuous fairness, and that he committed no error in the rulings complained of unless it be one in favor of the defendant. In allowing the defendant to withhold testimony regarding gambling receipts for 1938, the trial court, in recognizing the threat of future prosecution of the defendant for evading taxes in that year, was exercising a merciful discretion. For this avenue of inquiry plainly was relevant to the truth of the charges against Johnson in the present proceeding. In view of all that took place at the trial, to have denied the jury an opportunity to consider the significance of the defendant's desire not to testify regarding gambling receipts in 1938 would have been to withhold from them a factor relevant in determining whether Johnson's explanation of what he did with the "protection" money received by him in 1936 and 1937 was the truth or just a cock-and-bull story.

That the defendant's senior counsel, a lawyer of long experience in federal criminal practice, did not take exception to the manner in which Judge Maris tempered concern for the proper administration of justice with solicitude for the rights of the de-

fendant, indicates not "waiver" of a right which had been denied but recognition that the action of the trial judge was unexceptionable. The claim that the trial was conducted improperly is obviously an afterthought. Only after conviction and in an effort to upset the jury's verdict on appeal was the fair conduct of the trial court sought to be distorted into an impropriety.